

**K & E Bus Lines, Inc. and General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Elaine Bowley, and Sandra Brooks.** Cases 19-CA-11146, 19-CA-11244, 19-CA-11753, 19-CA-11227, and 19-CA-11532

April 16, 1981

### DECISION AND ORDER

On September 18, 1980, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief. Respondent also filed an answering brief.<sup>1</sup>

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Administrative Law

<sup>1</sup> The General Counsel objected to the scope of Respondent's cross-exceptions and moved to strike the cross-exceptions except for those portions pertaining to the General Counsel's limited exceptions. We find the General Counsel's motion to be without merit. Sec. 102.46(e) of the Board's Rules and Regulations, Series 8, as amended, states, in pertinent part, "Any party who has not previously filed exceptions may, within 10 days . . . from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief . . ." (Emphasis supplied.) Since the General Counsel had filed timely exceptions to the Administrative Law Judge's Decision, Respondent was entitled to file its cross-exceptions herein.

<sup>2</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings. Additionally, we find that Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge are totally without merit. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or acted as an advocate rather than as an impartial trier of fact. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. See, e.g., *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656 (1949). Furthermore, it is the duty of the Administrative Law Judge under the Board's Rules and Regulations (Sec. 102.35) to inquire into the facts by examining and cross-examining witnesses. We also find without merit Respondent's contention that the Administrative Law Judge abused her discretion in denying Respondent's motion to open the record to receive evidence which Respondent contends indicates that the Anchorage School District has authority to unilaterally remove drivers. In agreeing with the Administrative Law Judge's denial of the motion, we note that the proffered evidence concerns an alleged incident which occurred after the close of the hearing.

In finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by reducing the employment of employees Oesau, Brooks, Sargent, Northup, Tannehill, and Kale, the Administrative Law Judge referred to the employees' protected concerted activity, rather than their union activity, as the basis for their discharges and layoffs. We hereby correct the apparently inadvertent error, noting that the Administrative Law Judge's conclusory statements specifically advert to the union organizing campaign as the motive for Respondent's discriminatory terminations and reductions of employment. Also, in finding that Respondent unlawfully promised benefits to employees (sec. C of her Decision), the Administra-

Judge as modified herein and to adopt her recommended Order.

The Administrative Law Judge found, *inter alia*, that employee Sargent was one of several employees who were unlawfully discharged or laid off on November 2, 1978, but that, unlike the other employees, Sargent inexplicably failed to return to work later that day following a reinstatement offer by Respondent "which apparently included Sargent." Thus, the Administrative Law Judge found that Sargent's unlawful discharge lasted only from the morning of November 2 to the afternoon of the same day. We find, however, that the Administrative Law Judge overlooked certain evidence which establishes that Respondent never extended to Sargent a valid offer of reinstatement.

The record shows, and the Administrative Law Judge found, that after Respondent prevented several employees from working on November 2 Sargent attended a meeting with other drivers at a local restaurant. Later that day Respondent conducted a meeting of employees at which its president, William Knight, agreed to reinstate the employees who had been discharged or laid off that morning. Sargent testified that he heard Respondent announce at the meeting that the drivers could go back to work. Sargent further testified, however, that he visited Knight after the meeting to have a paycheck signed. Knight signed the check and told Sargent that he would call him "if everything cooled down." Respondent never called Sargent or offered him his job back. On December 21, 1978, Sargent received a written notice that he had been laid off.

An employee who is discriminatorily discharged or laid off is entitled to an unequivocal and unconditional offer of reinstatement. In view of Knight's statement to Sargent shortly after the November 2 meeting that he would call him back "if everything cooled down," we are unable to find that Respondent earlier made Sargent an unequivocal offer of reinstatement. Since Respondent did not meet its obligation to offer Sargent reinstatement, it shall make him whole for any loss of earnings suffered from his November 2, 1978, discharge to the date of a valid offer of reinstatement.<sup>3</sup>

Administrative Law Judge inadvertently omitted the word "not" from the sentence which correctly reads as follows: "Additionally, promising of benefits at the same moment the captive employee audience is told that the Union could not force the Company to agree to any matter it is unwilling to agree to, characterizing the Union's promises as 'cheap' mentioning the granting of benefits without the need to strike, and the assessment of dues and other costs, are classic examples of the fist in a velvet glove and constitute a separate violation of Section 8(a)(1) of the Act."

<sup>3</sup> Since the Administrative Law Judge's proposed remedy and recommended Order require Respondent to offer Sargent reinstatement and make him whole for any loss of earnings suffered as a result of his unlaw-

*Continued*

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, K & E Bus Lines, Inc., Eagle River, Alaska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

ful discharge, we find it unnecessary to modify those portions of her Decision.

## APPENDIX B

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Act, as amended, gives all employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT coercively interrogate you concerning your union sympathies and activities nor concerning the union sympathies and activities of your fellow employees.

WE WILL NOT threaten you with strikes, replacement, or with other reprisals because you support General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT engage in or create the impression that we are engaging in surveillance of your union activities.

WE WILL NOT accuse you of being union instigators or supporters.

WE WILL NOT solicit complaints and grievances that have led you to seek union representation and promise, either expressly or by implication, to correct those matters in an

effort to encourage you to forgo being represented by the labor organization of your choice.

WE WILL NOT correct or change working conditions that have led you to desire representation.

WE WILL NOT suggest and encourage you to withdraw your authorization for General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to act as your collective-bargaining representative.

WE WILL NOT campaign for or promote the cause of an employee grievance committee.

WE WILL NOT announce institution of negotiations for a profit-sharing plan or for improved benefits in an effort to influence your choice of a collective-bargaining representative.

WE WILL NOT dominate, support, assist, or otherwise interfere with the reestablishment, operation, and administration of the employee grievance committee, or any other labor organization of our employees.

WE WILL NOT discourage activity on behalf of General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by discharging, placing on standby, placing on forced leave of absence, refusing to hire, rehire or reinstate, suspending, harassing, disciplining, or otherwise discriminating against employees in any manner with respect to their tenure of employment or any term or condition of employment.

WE WILL NOT promise or grant benefits or improvements in terms and working conditions or announce such benefits or improvements to employees in order to discourage them from supporting the Union or any other labor organization.

WE WILL NOT threaten employees with economic and other reprisals because they engage in union activities or talk to or otherwise associate with known union supporters.

WE WILL NOT tell employees that support of a union will not be fruitful, that we will learn the identity of union card signers and the names of employees who support the Union.

WE WILL NOT tell employees that they will not be considered for employment or reemployment unless they give up the Union or refuse to hire them because charges were filed

on their behalf with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL withhold all recognition from, repudiate, and promptly and completely disestablish the employee grievance committee.

WE WILL grant employees Dolores Oesau, Sandra Brooks, Elaine Bowlby, Ellen Northup, and Frank Sargent immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them and employees George Kale, Margaret Tannehill, Darlene Teegarden, Shirley Roberts, Noretta Kamholz, and Doris Miller whole for any loss of earnings or benefits connected with their employment status they may have suffered because of our discrimination against them, with interest.

WE WILL expunge and remove from our records and files any warning notices, suspensions, or other notations dealing with the discriminatory actions against the employees named above.

K & E BUS LINES, INC.

### DECISION

#### STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard before me in Anchorage, Alaska, on November 27, 28, and 29, 1979,<sup>1</sup> and January 8, 9, and 10, 1980, pursuant to a complaint, as thrice amended, issued by the Regional Director for the National Labor Relations Board for Region 19 on April 10, May 11, August 13, and October 30, 1979, and which is based on charges filed in Case 19-CA-11227 by Elaine Bowlby, an individual, in Cases 19-CA-11244, 19-CA-11146, and 19-CA-11753 by the General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), and in Case 19-CA-11532 by Sandra Brooks, an individual. The complaint alleges that K & E Bus Lines, Inc. (herein called Respondent, the Company, or K & E), has engaged in certain violations of Section 8(a)(1), (2),<sup>2</sup> (3), and (4) of the

National Labor Relations Act, as amended (herein called the Act). Respondent denies committing any unfair labor practices.

#### Issues

Whether or not Respondent:

(1) Committed various violations of Section 8(a)(1) of the Act during and after a union organizing campaign by coercing, interfering with, and restraining employees by such actions as engaging in surveillance; creating the impression of surveillance; interrogating employees concerning their own and other employees' union activities; threatening to discharge or otherwise adversely affect employees' employment through layoff or forced leaves of absence, reduction in work, or suspension for engaging in protected concerted activity; instituting or promising benefits such as increased employer contribution to medical examination payment, sick leave, and profit sharing to influence the choice of a collective-bargaining representative; soliciting grievances with express or implied promise to correct matters raised to encourage abandonment of support for the Union; and prohibiting discussion of union affairs on company time.

(2) Dominated and interfered with the formation and administration of a labor organization known as the K & E Employees Association.

(3) Discriminated against various employees in reprisal for their union activities.

(4) Terminated Sandra Brooks on June 1 because she filed a charge with the National Labor Relations Board.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which were filed March 14, 1980, on behalf of the General Counsel and Respondent,<sup>3</sup> have been carefully considered.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent admits that it is an Alaska corporation which provides school bus transportation services for the Anchorage School District, as well as incidental charter services, in or near Eagle River, Alaska. It further admits that during the past year, in the course and conduct of its business, that its gross volume exceeded \$500,000 and that, during this period, it purchased and caused to be transferred and delivered to its facilities

<sup>1</sup> All dates herein refer to 1979 unless otherwise indicated.

<sup>2</sup> The order consolidating cases and amended consolidated complaint and notice of hearing, issued May 11, 1979, refers to the charge filed in Case 19-CA-11244 on March 27, 1979, which alleges violations of Sec. 8(a)(1), (2), and (3) of the Act, but the General Counsel failed to address the alleged violations of Sec. 8(a)(2) of the Act in the complaint. Inasmuch as evidence was introduced regarding this allegation, without objection, the charge also is found to be sufficiently related to the subject matter of the complaint, as amended, and will be considered on its merits. See *Free Flow Packing Corporation v. N.L.R.B.*, 566 F.2d 1124 (9th Cir.

1978); *N.L.R.B. v. Klaue*, 523 F.2d 410 (9th Cir. 1975); *REA Trucking Company, Inc. v. N.L.R.B.*, 439 F.2d 1065 (9th Cir. 1971). See also *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977).

<sup>3</sup> The General Counsel's 18-page brief, about half of which is devoted to the jurisdictional issue, fails to fully discuss all the issues raised in the complaint, does not request a remedy for the alleged violations of Sec. 8(a)(2) and (4) of the Act, and in general ignores or discusses the alleged violations in a cursory and cavalier manner. These failures, standing alone, will not be construed as abandonment of position.

within the State of Alaska goods and materials valued in excess of \$50,000 directly from sources outside Alaska.

Based on the foregoing, it is concluded and found that Respondent admits it is, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Although Respondent is found to be an employer, the question remains whether jurisdiction should be asserted because the great majority of Respondent's business is performed pursuant to contracts with the Anchorage School District and involves the busing of public school children.

#### Jurisdiction

This threshold issue involves resolution of several questions:

(1) Whether Respondent is subject to the Board's jurisdictional standards or is exempted under the political subdivision exception to Section 2(2) of the Act.

(2) Should the Board apply the "intimate connection" test as urged by Respondent.

(3) Does the Anchorage School District exercise over Respondent sufficient control over the terms and conditions of employment as to abrogate Respondent's ability to bargain effectively.

(4) Whether the Board can assert jurisdiction over Respondent for alleged unfair labor practices occurring prior to February 22, the date of the jurisdictional standard announced in *National Transportation Service, Inc.*, 240 NLRB 565 (1979).

(5) Whether such rules can be announced by administrative adjudication rather than by rulemaking.

In *National Transportation Service, Inc.*, *supra*, the Board stated:

[W]e have further considered the so-called "intimate connection" test, and have decided that we will no longer utilize that standard for ascertaining whether the Board's assertion of jurisdiction over an employer with close ties to an exempt entity is warranted. Instead, in this and future cases involving a determination whether the Board should assert jurisdiction in such situations, we shall determine whether the employer itself meets the definition of "employer" in Section 2(2) of the Act and, if so, determine whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.

A leading case enunciating the "intimate connection" test is *Rural Fire Protection Company* [216 NLRB 584 (1975)] in which the majority described the test as having two aspects: (1) whether the non-exempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' representative, and (2) where the employer retains such control, "the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer . . ." [216 NLRB at 586]. We conclude that the first aspect of

this test—i.e., whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees—is by itself the appropriate standard for determining whether to assert jurisdiction in situations such as that presented in the instant case. Once it is determined that the employer can engage in meaningful collective bargaining with representatives of its employees, jurisdiction will be established. [Cf. *Catholic Bishop of Chicago, a Corporation Sole, Department of Federal Programs*, 235 NLRB 776 (1978).] Section 14(c)(1) of the Act is the basis of the Board's discretion to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." However, nothing in the legislative history of this provision indicates any congressional intent that the Board decline to assert jurisdiction over any employer solely because of the relationship between services it provides to an exempt entity.<sup>4</sup>

See further *Kal Leasing, Inc.*, 240 NLRB 892 (1979); *Metro Ambulance Service*, 249 NLRB 228 (1980); *Soy City Bus Services, Division of R. W. Harmon & Sons, Inc.*, 249 NLRB 1169 (1980),<sup>5</sup> and *R. W. Harmon & Sons, Inc.*, 250 NLRB 172 (1980).

It is clear from the above-cited cases that the "intimate connection" test is no longer applicable in determining whether jurisdiction should be asserted over an employer with close ties to an exempt entity. Therefore, the question is whether the Employer exercises sufficient control over the employment terms and conditions of employees to enable it to bargain with a labor organization as their representative.

Respondent argues that the Board does not have jurisdiction in the proceeding because the degree of control the Anchorage School District exercises over its employees precludes any meaningful collective bargaining with the Company. Respondent avers that certain provisions in its agreement with the school district, by which the district determines the bus routes and scheduling, prescribes the rules of conduct to be followed by students on Respondent's buses, reserves the right to recommend hiring and dismissal of Respondent's drivers, negotiates the contract rates paid for the runs, and prevents sufficient control to allow meaningful bargaining.

Similarly, Respondent also contends that the provisions of the Alaska School Bus Drivers Manual so proscribes the duties and responsibilities of the employees as to preclude meaningful bargaining as to terms and conditions of employment.<sup>6</sup>

<sup>4</sup> The parties have stipulated that the Anchorage School District is an exempt entity.

<sup>5</sup> The Board found that the local-in-character test was not an applicable jurisdictional standard, noting "educational institutions are no longer considered to have merely a localized impact." This ruling is followed herein.

<sup>6</sup> For example, the manual establishes where students can leave the buses, what to do in the event a discipline problem arises with a student, who may be transported on the bus, student conduct, safety equipment to be carried on the bus, and etc.

The school district's right to unilaterally establish, modify, eliminate, or otherwise change routes, scheduling, days, and hours of operation, to regulate student conduct merely are specifications of the nature of the services it is contracting for and do not confer upon the district the right to supervise Respondent's employees in respect to their performance of these services. See *Kal Leasing, Inc., supra*, where the Board also states: "With respect to the district's right to prescribe student conduct on the Employer's buses, we again fail to see how this provision has anything to do with control over the Employer's labor relations."

Respondent's argument that the Alaska School Bus Drivers Manual so prescribes the employees' responsibilities and duties as to preclude meaningful collective bargaining is also found to be without merit. As stated in the foreword of the manual:<sup>7</sup>

The intent of this manual is to provide the necessary instructional material which will serve as an up-to-date source of driver information and proper procedures necessary for driving a school bus. This manual is by no means considered a complete document containing all that a school bus driver needs to know. It is rather a guideline to good driving practices and an indication to the complexity of the safe driving task and to the knowledge that is needed.

The manual, like the contract, merely describes the nature of services to be provided, defines the methods of safe operation, and characterizes its content as instructional. After examining the manual and considering the parties' arguments, it is concluded that the provisions are not so restrictive as to preclude effective collective bargaining. For example, the manual does not dictate which employees are assigned which routes, seniority systems, salaries, or many other terms and conditions of employment.

Russell Knodel, the assistant deputy superintendent for auxiliary services of the Anchorage School District for the past 12 years, testified at length regarding the district's control over Respondent's employees. Knodel personally handles most of the contract operations of Respondent. With regard to hiring, Knodel stated that he did not play any role in K & E's hiring of drivers. The district does not take part in interviewing prospective drivers or in advertising for new school bus drivers. The district's only involvement is to "put a crowbar behind them [K & E] once in a while if he [Knodel] is convinced they do not have enough drivers, such as the case this summer . . . the procurement of drivers is his [Bill Knight's] business and I don't interfere too much."<sup>8</sup>

After drivers are hired, K & E does submit a list containing the names of all drivers, their drivers license numbers, a copy of their school bus driving license, and

copies of the results of medical examinations. Generally, according to Knodel, the lists are submitted after school starts.<sup>9</sup> Knodel contends that he can reject anyone on the list. He spends approximately 1 hour each fall reviewing the list to insure everyone has passed their medical examination and to see if any drivers "might have a bad history." Knodel has never exercised this claimed right; therefore, it cannot be found that rejection by the school district is completely unfettered by Respondent's own judgments and authority. In fact, Knodel does not claim he can prevent the hiring of an individual; he claims he can only reject or stop K & E's proposed usage of that employee as a driver under the district's contract.

Section 11 of the contract provides:

The contractor shall, each year of the contract, file with the School District at its administrative office the following:

- a. A certified statement that each regular and substitute driver has complied with all State of Alaska Statutes Governing the Operation and Licensing of Motor Vehicles and Drivers, listing the name and address of the licensed driver and the number assigned to his School Bus Driver's Permit.
- b. A personnel report of each regular and substitute driver. This report will be made on forms provided by the School District and will be required only at the beginning of the contract and for each new driver employed during the life of the contract.

Sections 17, 18, and 19 of the contract provide:

17. Before transporting pupils under the contract, the contractor and all school bus drivers driving vehicles under this agreement shall first secure the special bus driver's permit issued by the Department of Public Safety. It shall be illegal to operate a school bus without a valid school bus driver's permit in the possession of a vehicle operator. All bus drivers must be at least nineteen (19) years of age, and shall possess a valid first aid card. Extenuating circumstances may allow a contractor a reasonable amount of time for first aid cards to be acquired by drivers and shall be acquired within approximately one (1) calendar month from the beginning of the school year, or the date of hire.

18. The contractor will operate under the direct supervision of the Director, Auxiliary Services.

19. Bus drivers must be approved by and acceptable to the Anchorage School District. The Superintendent of Schools, or his designee, may direct the contractor, at any time to change drivers on route or to relieve any driver of his duties—if in the best interest and welfare of the School District.

There is no clear showing that the director of auxiliary services has supervisory obligations beyond insuring compliance with the contract. Therefore, the term "su-

<sup>7</sup> Resp. Exh. 4, p. 3.

<sup>8</sup> The perceived need for adequate staffing is found to be a reflection of the district's concern that the services contracted for are provided. Who is interviewed and employed is not dictated by Respondent. Additionally, the perceived need for drivers for the 1979-80 school year is noted and will be considered in evaluating Respondent's alleged discriminatory actions.

<sup>9</sup> The timing of the submission of the list confirms Knodel's testimony that the district is not involved in Respondent's hiring processes.

pervision," as used in section 18 of the contract, cannot be construed as delegating to the director of auxiliary services such control of K & E's employees as to preclude the Company from effectively bargaining with the employees' representative. This finding is supported by the language of section 19 of the contract, which does not afford the district the unbridled right to change or relieve a driver of his duties, but permits such action only upon a determination that it is "in the best interests and welfare of the School District." Furthermore, the terms do not empower the district to fire an employee of Respondent, but merely to proscribe that employee's activities on behalf of the district under the contract. Knodel has never effectively directed the removal of a contractor's employee but did direct one of the school district driver's removal for drinking. This action against one of the district's own employees is not probative of the power to fire one of Respondent's employees.<sup>10</sup>

Knodel believes that he has asked K & E to change the route of a particular bus driver once or twice in the past 5 years. The district plays a very limited role in the training of drivers; it only trains driver instructors which are employees of K & E and these driver instructors actually train the bus drivers working for K & E. Knodel does address K & E's employees at least once a year at a meeting concerning safety and student behavior. In the making of route assignments, other than the one or two instances Knodel requested a particular employee be assigned a specific route, K & E determines which driver gets which route.

Other than the operating restrictions imposed by the guidelines formulated by the State Department of Education, K & E can discipline, hire, or fire, or evaluate employees for raises or promotions without the district's approval. Also, Knodel admits, K & E controls such terms and conditions of employment as wages, hours of employment, seniority, internal grievance procedures, fringe benefits, and other types of remuneration.

Most of the conversations testified to by Knodel and Respondent's supervisors, Grady and Bill Knight, indicate that in actual practice<sup>11</sup> K & E is not bound to comply with any disciplinary or dismissal request of the district and, in fact, both Bill and Grady failed on one or more occasions to follow such recommendations. The

limited disciplinary and dismissal authority reserved by the district does not rise to the level of supporting a finding that such actions are controlled by the district and not the Employer. It is noted that the contract itself refers to K & E as a contractor, not an agent, representative, joint venturer, or employee of the school district. Accordingly, it is concluded that Respondent retains sufficient day-to-day control over its employees and its labor relations policies to enable it to engage in meaningful bargaining over conditions of employment with a labor organization, despite the fact that it is required to maintain certain standards under its contract with an exempt entity. Therefore, it is further concluded that jurisdiction should be asserted over Respondent's operation.

The next issue is whether assertion of jurisdiction should be limited to alleged violations occurring subsequent to the issuance of the decision in *National Transportation*, *supra*. Respondent argues that the new standard announced in *National Transportation* was not applicable at the time most of the conduct complained of occurred and it would be inappropriate and improper "to apply jurisdiction retroactively to Respondent." This argument is found to be without merit. As the Board explained in *Siemens Mailing Service*, 122 NLRB 81, 84-85 (1968):

[T]he Board does not believe that the mere fact that a respondent had reason to believe by virtue of the Board's announced jurisdictional policies that the Board would not assert jurisdiction over it, gave it any legal, moral, or equitable right to violate the provisions of the Act. This is especially true since the issuance of the *Guss* decision [*Guss v. Utah Labor Relations Board*, 353 U.S. 1, decided March 25, 1957] which eliminated all possible basis for believing that in such circumstances the provisions of the Act did not apply, or that State law could or would apply to its conduct. In the final analysis what is conclusive with us is the fact that any other policy would benefit the party whose actions transgressed the provisions of the Act at the expense of the victim of such actions and of public policy.

This policy has been expressly approved by the courts. *Local Union No. 12, Progressive Mine Workers of America, District No. 1 [Rawalt Coal Co.] v. N.L.R.B.*, 189 F.2d 1, 4-5 (7th Cir. 1951), cert. denied 342 U.S. 868; *N.L.R.B. v. Kartarik, Inc.*, 227 F.2d 190, 192 (8th Cir. 1955); *N.L.R.B. v. Stanislaus Implement and Hardware Company, Ltd.*, 226 F.2d 377, 379 (9th Cir. 1955); *Optical Workers' Union, Local 24859, et al. v. N.L.R.B.*, 229 F.2d 170, 171 (5th Cir. 1955), cert. denied 351 U.S. 963; *N.L.R.B. v. F.M. Reeves & Sons, Inc.*, 273 F.2d 710, 712 (10th Cir. 1959); *N.L.R.B. v. Pease Oil Company*, 279 F.2d 135, 137-139 (2d Cir. 1960); *N.L.R.B. v. Guernsey-Muskingum Electric Cooperative, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). See also *Lakeland Convalescent Center, Inc.*, 173 NLRB 97 (1968). Approval of this approach was clearly expressed in *N.L.R.B. v. Rochester Musicians Association Local 66*, 514 F.2d 988, 991 (1975), which found:

<sup>10</sup> On March 14, 1980, a motion by K & E was received seeking reopening of the record for the receipt of "newly discovered evidence which has become available only since the close of record and which impacts directly upon the issue of jurisdiction." By order dated March 21, 1980, the motion was denied for: (1) The evidence was not properly definable as newly discovered, citing *N.L.R.B. v. Jacob E. Decker and Sons*, 569 F.2d 357 (5th Cir. 1978); (2) events occurring after close of the hearing cannot be, in normal circumstances, the basis for reopening proceedings for it raises the potential of perpetual continuance of the proceeding; and (3) the evidence to be adduced is cumulative, and was not shown to have required a different result, citing *N.L.R.B. v. Jacob E. Decker & Sons, id.* at 367.

After reconsideration of this motion, it is concluded that denial was the proper decision for the reasons stated above. Knodel did mention making a request of K & E to discharge an employee, but K & E, through Grady Knight, determined that discharge was not warranted. Although discussions were held with Knodel, and Knodel did not appear to press the issue, Grady Knight's view not to terminate the employee prevailed. To consider another Knodel request for termination, as proposed in the motion, is considered cumulative and unwarranted.

<sup>11</sup> See *Board of Trustees v. N.L.R.B.*, 624 F.2d 10th Cir. 1980.

But our reasons for rejecting the union's reliance argument go much deeper than this. We do not construe the Board's voluntary limitation on its own jurisdiction to permit the labor laws to be violated with impunity, for the statutory prohibition remains although the means of enforcement have been suspended. As we noted in upholding an unfair labor practice charge in connection with acts committed at a time when the violator was not subject to the Board's jurisdiction, "An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience." *N.L.R.B. v. Pease Oil Company*, 279 F.2d 135, 137 (2d Cir. 1960). Indeed, this supplies the Board's rationale for routinely applying new jurisdictional standards to all pending cases. See *Siemons Mailing Service, supra*, 122 NLRB at 84-85. Accordingly, even if the union had in good faith assumed that the earlier dismissal would prevent the Board from ever again asserting jurisdiction over the Jones incident we would deny it the shield for continuing illegality which it seeks. As we said in *Pease Oil, supra*:

Thus respondent's "reliance was simply an expectation that it might pursue whatever labor policy it saw fit, safe from any Board interference no matter how many violations of the Act it might commit. We have no hesitation in disappointing this expectation."

In this proceeding, flagrant violations of the Act are alleged, and therefore: "The principles of equitable estoppel [cannot] be applied to deprive the public of the protection of mistaken action or lack of action on the part of the public officials." *N.L.R.B. v. Baltimore Transit Company, et al.*, 140 F.2d 51, 55 (4th Cir. 1944), cert. denied 321 U.S. 795, and cases cited therein; cf. *The Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, 253 (1944). Therefore, it is concluded that under the circumstances of the case, public policy requires assertion of jurisdiction over the entire time frame referred to in the complaint, as amended.

The bare contention that the only method that jurisdictional standards can be altered is through rulemaking is also found to be without merit, as the court found in *N.L.R.B. v. Guernsey-Muskingum Electric Cooperative, Inc.*, 285 F.2d 8 (6th Cir. 1960), enfg. 124 NLRB 618 (1959). See, for example, *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), wherein the court detailed the applicable criteria in determining whether a particular entity was subject to the "political subdivision" exemption of Section 2(2) of the Act. The court recognized that the standards must be applied on a case by case basis, and if the implementation of a particular criterion is subjected to rulemaking, it would completely abrogate the decisionmaking efficacy of the Board. Respondent makes the mistake of classifying the Board's prior use of the "intimate connection" test to that of rulemaking, a factual error. The intimate connection test was promulgated in a decision, yet Respondent recognizes its former efficacy. Respondent has advanced no persuasive reason for requiring rescission or

deemphasis of the standard in a similar manner; i.e., through rulemaking.

As the Board stated in *R. W. Harmon & Sons, Inc.*, 246 NLRB 223 (1979):

Respondent asserts that the Board's decision to depart from its previous position of declining to assert jurisdiction over employees engaged in providing school bus transportation was promulgated improperly through an adjudicative proceeding in *National Transportation Services, Inc., supra*, and should instead have been the subject of a "rulemaking" procedure pursuant to Section 6 of the Labor Management Relations Act (29 U.S.C. §156), and Section 4 of the Administrative Procedure Act (29 U.S.C. §553). Respondent contends that applying the new jurisdictional test enunciated in the *National Transportation* case without providing notice and seeking comment, as required by the Administrative Procedure Act, renders the new test invalid and, accordingly, the Board should not have applied it in the instant case. We find no merit to Respondent's contention that the Board acted improperly in applying the new jurisdictional test enunciated in the *National Transportation* case without first conducting a rulemaking proceeding pursuant thereto. In this connection, we note that it is well established that adjudicated cases may serve as precedent, and that the Board may apply those precedents to the parties in an adjudicatory proceeding.

*R. W. Harmon, supra* citing *New York University*, 205 NLRB 4 (1973); *University of San Francisco*, 207 NLRB 12 (1973); and *N.L.R.B. v. Wyman-Gordon Co., et al.*, 394 U.S. 759 (1969).

Accordingly, it is concluded that the Board has jurisdiction of Respondent during the entire period covered in the complaint, as amended.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. OTHER PRELIMINARY MATTERS

Respondent contends that the amended charge to Case 19-CA-11146, filed May 11, 1979, and the complaint issued thereon alleging reduction of earnings, harassment, and other activities not alleged in the original charge in the complaint should be dismissed as untimely.

Case 19-CA-11146, filed February 22, 1979, as amended May 11, alleging that misconduct occurred in October and November 1978, was originally filed within the statutory period and alleged that eight employees<sup>12</sup> were discriminated against for engaging in protected concerted activity. The charge also stated: "The Union would like to reserve the right to add names to the charge in the event anyone has been omitted."

<sup>12</sup> Sandra A. Brooks, George B. Kale, Noretta E. Kamholz, Dolores J. Oesau, Shirley Roberts, Margaret Tannehill, Darlene Teegarden, and Barbara E. Northup.

The amended charge did not add any names to the list of employees allegedly discriminated against, rather the amendment modified the description of the nature of the discrimination. Each amended charge contains the conclusionary printed language following the specifically alleged violations which reads: "By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." That the nature of the discrimination was modified in the amended charge is found to be a change of such a minor nature as to not violate the considerations of due process or the equitable considerations underlying the 6-month statute of limitations, and it is hereby concluded that Respondent has received adequate notice in a timely manner. Furthermore, the above-quoted language in the charge form adequately supports the specific allegations in the amended complaint. See *Benner Glass Co.*, 209 NLRB 686, 687 (1974), and *Staco, Inc.*, 234 NLRB 593 (1978). It is concluded that the amendment was merely additional description of the alleged unlawful activity and the "catchall" phrase quoted above was "sufficient to include these modifications as reflected in Respondent's answer to the amended complaint which admits that" the amended complaint is a repetition of the original complaint, Respondent's reply failed to raise the issue of the 6-month time period, nor was the issue raised at the hearing, clearly reflecting the adequacy of notice. Accordingly, it is concluded that the amendment is not barred by the 6-month limitations period.

Section 10(b) of the Act provides that no complaint should issue based on any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board. This section, however, only relates to the actual filing of charges and, once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act, who has the decision to act upon the charge "as he deems fit." See *California Pacific Signs, Inc.*, 233 NLRB 450 (1977). In this case, no abuse of discretion has been shown.

Respondent also contends that the amended complaint issued as a result of the May 11 amended charge contained many additional specifications beyond the scope of the original charge and such specifications were issued after expiration of the 6-month period for filing charges. This allegation is found to be without merit for the original charge upon which the amended complaint rests, as found hereinabove, was clearly filed with the 10(b) period. Also, the specifications contained in the amended complaint are clearly related to the issues raised in the General Counsel's original complaint. Finally, Respondent did not raise the 10(b) issue either as an affirmative defense in the reply to the complaint, or at the hearing. See *Glazers Wholesale Drug Company, Inc.*, 209 NLRB 1152, 1153, fn. 1 (1975), and *Laborers' International Union of North America, Local 252, AFL-CIO (Seattle and Tacoma Chapters of the Associated General Contractors of America, Inc.)*, 233 NLRB 1358, fn. 2 (1977).

Finally, Respondent raises in its brief, again for the first time in this proceeding, the affirmative defense that all specifications relating to Elaine Bowlby should be dis-

missed because she was not employed by Respondent since the spring of 1978 and the charge was filed on September 11, 1979, alleging refusal to rehire her.<sup>13</sup> This assertion is also found to be without merit. The record contains some evidence that Bowlby believed she was on a leave of absence. She did work for Respondent on two charter bus runs during the summer of 1978, contrary to Respondent's contention that her employment terminated in the spring of 1978. Furthermore, the initial allegation that Respondent refused to reemploy Bowlby after her return from a leave of absence because of her protected concerted activities was contained in the charge filed in Case 19-CA-11227 filed on March 23, 1979, which is well within the 10(b) period because it was not until her return in the fall of 1978 that she was informed she would not be rehired to her former position. "The Board has consistently held, with the endorsement of at least two circuits, that the six-month limitation does not begin to run until the . . . unlawful activity, which is the basis for the unfair labor practice charge, has become known to the charging party." *N.L.R.B. v. Allied Products Corporation, Richard Brothers Division*, 548 F.2d 144, 650 (6th Cir. 1977). See also *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Washington)*, 242 NLRB 1157 (1979).

#### IV. ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

Respondent is engaged in providing bus transportation services. As pertinent herein, K & E contracted for many years with the Anchorage School District to transport children for the public schools in the Chugiak-Eagle River area. The general manager and president of Respondent is William F. (Bill) Knight. The manager, until sometime in November 1978, was William Knight's son, Grady Knight.<sup>14</sup> William Knight's wife, Ravenna (Bobbie) Knight, is also found herein to have been an agent and/or supervisor of K & E during the pertinent time periods and since mid-November 1978 was designated as a supervisor. The Company's denial of Mrs. Knight's supervisory status was not supported by any probative evidence. Bill Knight and other supervisors of Respondent followed her decisions, rather than discussing or separately ratifying them; hence, it is concluded that the credited testimony clearly establishes her agency and supervisory status.

Based on uncontroverted evidence, it appears that, near the conclusion of the 1977-78 school year, Bill

<sup>13</sup> Respondent substituted counsel in the course of this hearing. At no time during the hearing or subsequently was substitution alleged to have resulted in inadequate representation. The time afforded to acquaint new counsel with the case was admittedly sufficient to adequately prepare. Therefore, such substitution cannot explain these noted failures to plead the statute of limitations in a more timely manner.

<sup>14</sup> Respondent asserts that Grady Knight was not a supervisor at the time the alleged unfair labor practices occurred. However, as discussed more fully hereinafter, the credited testimony clearly demonstrates that at the time herein pertinent Grady Knight had been acting as an agent and/or supervisor within the meaning of Sec. 2(11) and (13) of the Act.

Knight informed his employees that they would receive a 15-percent raise the following school year. The bid K & E submitted to the Anchorage School District reflected this increased operating expense. To be awarded the contract, K & E had to substantially lower its bid and, therefore, decided not to increase salaries. A few days prior to receiving their first paycheck of the 1978-79 school year, Bill Knight told the employees that they would not receive the customary<sup>15</sup> and promised raise. Bill Knight informed the employees that he could not afford the raise.

According to the uncontroverted testimony of Shirley Roberts,<sup>16</sup> the failure to receive the raise cojoined with some other unspecified "little things" led a number of the employees to consider seeking representation by the Union. The Union was initially contacted by Elaine Bowlby. On approximately October 20, the interest in seeking union representation was a subject of discussion at work according to Brooks' credited and uncontroverted testimony.<sup>17</sup> On or about October 27, the first organizing meeting was held at Dolores Oesau's house and approximately 15 employees attended, including Elaine Bowlby, Sandra Brooks, Tim Amerson, Noretta Kamholz, Darlene Teegarden, Doris Miller, Dolores Oesau, Shirley Roberts, Bernie Kale, Ralph Hemingway, Margaret Tannehill, and Floyd Conner, a union representative. Authorization cards were passed out at the meeting; some were signed that evening and returned to Conner. By letter dated November 14, the Board declined to assert jurisdiction and dismissed the representation petition.

#### *B. Alleged Interrogations and Surveillance by Grady Knight*

Grady Knight testified that until October 30 or November 1 he was K & E's manager. While manager, according to Sandra Brooks, about the same time she first heard of the union organizing campaign, Grady Knight called her into his office and inquired "who started it, who contacted her about the union."<sup>18</sup> The second meeting Brooks had with Grady Knight occurred, she believes, shortly after the meeting at Oesau's house on October 27, and prior to November 2. Grady Knight entered the drivers' room and asked her to meet with him in his office. According to Brooks, Grady "said that he was afraid of the Teamsters. They slashed tires and he has to watch his truck and that type of thing." The second meeting allegedly started "as he started all the meetings with her by inquiring if she knew who started the union." In reply, Brooks told him she did not know.

<sup>15</sup> Joyce Conley's testimony that it was a common practice for the employees to get a raise each year is unrefuted.

<sup>16</sup> Mary Hall, another employee of K & E, also testified that when the employees received their first paychecks for the 1978-79 school year and discovered they had not received a raise "some people got very upset."

<sup>17</sup> The basis for crediting Brooks' testimony is discussed below.

<sup>18</sup> Brooks also testified credibly that on or about November 6, Grady called her into his office to relate a change in policy his father, Bill Knight, wanted to implement. The retention of an office with the assigned duty to implement policy changes effectively refutes the claim that Grady Knight was not a manager after October 30. Based upon demeanor, clarity of recollection, inherent consistency of the testimony, I find Brooks to be candid and truthful.

At the meeting, Grady Knight assertedly stated that "he knew who started it . . . she<sup>19</sup> had taken a leave of absence." Brooks stated that she "had told Grady Knight that I had voted Teamsters four years ago."

Brooks also recalled<sup>20</sup> that Grady Knight had prepared a written presentation in an attempt to demonstrate to her that his father could not afford to give them a raise. After Brooks returned to the drivers' room, she observed Grady Knight asking other drivers to come to his office.

Darlene Teegarden recalled having a conversation with Grady Knight "right before" the organizing meeting of October 27. According to Teegarden, "he asked who was organizing the Teamsters and I told him I didn't know. He asked quite a few times. He mentioned names that he thought might be doing it, and I just told him I didn't know. He said he had a list and he was marking off people." She also remembered Grady Knight mentioned a few names that were on the list; he stated that "some of them had tried to bring in the union before." The persons mentioned by Grady were Dolores Oesau, Sandy Brooks, and Margaret Tannehill. Later that afternoon, Teegarden asserts, she was again asked to meet with Grady Knight in his office, and Grady again inquired who was organizing the Teamsters and she again replied that she did not know.

Shirley Roberts testified that, sometime between the first of November and November 22, Grady asked her if she had signed a union authorization card. She stated that the inquiry was made at a time when Grady was still manager, although she was unclear about the date of this conversation. At the time of this inquiry, Roberts believes "that people were being called in, like several times off and on, to find out what was going on . . . at the time." Roberts, like Brooks, witnessed drivers being called into Grady Knight's office as well as into Mr. and Mrs. Knight's office.

Grady Knight denied making any inquiries of any employees regarding the union organizing campaign and specifically denied having any knowledge of the campaign prior to November 2. Based on demeanor, Grady Knight's admission that he attempted at several drivers' meetings and by individual private inquiries "to find out what their problem was," the use of the same euphemisms for union activity that his father employed, inherent probabilities, and lack of candor, Grady Knight's testimony is not credited.

Furthermore, the record persuasively demonstrates that Bill Knight was informed prior to 1 p.m. on November 2 of allegations that his son was interrogating some employees. Knodel recorded the November 2 employee meeting, and Respondent placed the tape recording in

<sup>19</sup> It appears that the individual who Grady Knight was referring to is Bowlby, who was the only employee at this time whose status would arguably be referred to as "being on a leave of absence and who was active in the prior organizing campaign 4 years prior to this meeting." This statement has great import in determining the issue of Bowlby's status. Respondent asserts Bowlby quit, and the General Counsel and Bowlby claim she was granted a leave of absence.

<sup>20</sup> Brooks was not certain whether the presentation was made during the first or second meeting but believed it occurred at the later meeting.

evidence.<sup>21</sup> At the beginning of the meeting, Bill Knight stated:

I won't even stand for it. And then, Grady—I want to apologize for him because he is telling I've been driving him a little, and he's kind of taking things in his own hands and making a few mistakes. And he wasn't authorized to talk.

Later in the meeting, Bill Knight stated:

Grady has took too much on himself, or he's failed to absorb the way that I explained to him. He's even gone out—I've got it that he's even tried to tell the drivers that they had to be finks. I don't want no damn finks working for me. They don't have to work for me, all they have to do is to do their job and drive that bus and do their work, park it and clean it, and go and come, and get paid.

This statement is found to be an admission of the interrogations by Grady Knight prior to the November 2 meeting and the failure to demonstrate that such knowledge was acquired on November 2, cojoined with the claim that Grady was relieved as manager prior to this time because of dissatisfaction with his work, leads me to conclude that the credited claims of interrogation and surveillance discussed above were known to Bill Knight prior to November 2.

Grady Knight did admit attempting to find out "what their problems were," but did not express a valid purpose for asking this question or for any of the other actions found above. There is no claim that assurances against reprisal were extended to the employees he questioned. The substance of the questions related to the employees' union membership or proclivity toward unionizing the Company. The substance of the inquiries and comments were of such a nature as to raise fear in the minds of employees. See *Regal Shoe Shops*, 249 NLRB 1210 (1980).

Accordingly, I find that, in these circumstances, Grady Knight coercively interrogated employees about their own and Respondent's other employees' protected concerted activities and told Teegarden that he was engaging in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act.

*C. Alleged Interrogation by Bill Knight of Employees on or about October 30, Solicitation of Grievances, Threat of Surveillance, and Alleged Discharge of Dolores Oesau*

Oesau claims that on October 30, the first workday after the meeting at her home, she reported to work and found that her bus key was not in its usual place. She asked Grady Knight where the key was and he replied she would not be driving that morning, that Bill Knight wanted to see her. According to Oesau, at the meeting in Bill Knight's office, he said:

that he wanted to know what in the hell was going on and that he knew about my cute meeting. And I asked him—after he said what in the hell was going

on, what he meant. And he said he knew about my cute meeting and that he wanted to know if I realized that the unions put small business people out of business. And, of course, at the time, I said are you referring to—or either I asked him if he was referring to the trucking company<sup>22</sup> or he mentioned it, but it—I told him that according to the papers and everything else it was not the union, it was actually mismanagement because they had purchased all these trucks anticipating from the oil line to develop, also the gas line. . . .

Well, he wanted to know what all the problems was, and I told him that my—or what the grievances was, and I told him that I couldn't tell him what the other ones grieved about but I would tell him what I had to say, but they involved his son Grady Knight and I requested Grady Knight to be present too.

Grady Knight did attend the rest of the meeting. Oesau complained about a change in policy, particularly certain inspection procedures. Msrs. Knight did not respond to her complaints; so:

I asked Mr. Knight why the policies were changed and he said none of the policies had been changed. And I asked him why was Mr. Grady Knight, or his son Grady, doing these things, then. And he says I've had him do it because I'm jealous of him. I told Mr. Knight I thought it was the most asinine statement I had ever heard of. I said really, you don't get the best out of drivers or workers by harassing them. And anyway, that pretty well ended it. And he told me to go on home and that if I was going to return back to work they'd call me.

That same day, Oesau was called at 11:30 a.m.<sup>23</sup> to return to the job and worked that afternoon and the following day. On October 31, as Oesau was driving a high school run, she experienced tire trouble. Oesau claims she had a blowout going about 50 miles per hour around a curve. She managed to bring the bus to a safe stop, and no one suffered any injury. She called Grady Knight, who brought a replacement.

Grady Knight stated that he experienced some difficulty with Oesau the last week of October 1978. Grady Knight recalled the meeting in his father's office; he claims that Oesau attacked his ability as a manager. He did recall a discussion of the inspection procedures; however, both he and his father deny that any reference to the union organizing campaign was made during the meeting.

Regarding the flat tire incident, Grady Knight claims that, when he arrived with a mechanic, the tire was almost flat, not a blowout; the bus was stopped on a straight portion of the road, approximately one-half to three-quarters of a mile from the high school, a location

<sup>21</sup> See Resp. Exh. 26, which is reproduced herein as Appendix A. [Omitted from publication.]

<sup>22</sup> K & W Trucking Company is the business Bill Knight allegedly referred to in the conversation. Apparently, Knight claimed K & W went out of business because of the Union and Oesau claimed the case was mismanagement.

<sup>23</sup> She normally reported to work at 6:30 a.m. and 1:30 p.m.

so close to the school that he believed it was impossible or highly unlikely she could have attained the speed of 50 miles per hour loaded with 30 or 40 children, particularly since the first half mile is uphill.

Grady Knight also indicated that Oesau did not take the proper safety precautions, stating that the rear of the bus was still on the road and no flares had been set out; Oesau was out of the bus, walking up and down appearing quite upset. Grady Knight claims that he had the children transfer from the disabled bus to the replacement he brought, tried to calm Oesau, and decided to let her complete the workday.

That evening Oesau admitted mentioning to several people, including Bobbie Knight, that she was feeling ill either because of the blowout or she was getting the flu, which, according to her uncontroverted testimony, was afflicting several of the drivers. According to Oesau, the day after the blowout, November 1, while she was in the drivers' room waiting to take her extra activity run, about 4:20 p.m., Bill Knight came up to her, appearing quite upset, waving his arms around, and said she was fired, that he was not going to have a nervous worker that gets upset over a little tiny blowout. Oesau tried to argue with Bill Knight about his assertion that she was a nervous driver, but he left the room.

Bill Knight's version of the incident is that he talked with Oesau the evening she had the blowout:

I happened to be back into the garage part, to where when she parks her bus and comes in. And when she came in, she—she was shaking and crying a little, and I patted her on the back and told her not to be excited about it, come on into the office and just sit down and we'd talk about it. And I told her what I thought was best, how to handle it, you know, if you have a near accident or involved in a wreck, that the best thing was to, you know, continue working. She was talking about going to school at night, studying, she had sort of like the flu or a cold coming on . . .

I told her that if she—I told her to go home and take her a nice hot drink and pour some Cuddy Sark [sic] or something in it or—then go to bed and get a nice night of rest and when she wakes up in the morning, if she felt like she wasn't too nervous, come on in; if she didn't feel good—her run was one of the later ones to leave, to go ahead and take off if she wanted to, but I left that up to her that morning.

Bill Knight claims that Oesau was agreeable and left in a much calmer frame of mind. Bill Knight stated that, 2 or 3 days to a week later, he again met with Oesau and "I told her I thought it would be good to take a week off" or however much time she felt she needed for "I believed she was going to prepare for a real estate test . . ." Bill Knight also averred that Oesau was not discharged at this time, rather she was placed on a leave of absence.

Bill Knight's testimony is not credited.<sup>24</sup> The evidence of record clearly supports a finding that Oesau was discharged on November 1. The tape recording of the November 2 meeting clearly demonstrates that, on that date, Bill Knight admitted Oesau was not actively assigned routes "because of nervousness." Bill Knight's demonstrated lack of candor, demeanor, and the numerous inconsistencies in his testimony require the conclusion that he is not a credible witness and his testimony, generally, will not be credited hereinafter.

Brooks claims that, like Oesau, she also was called into Bill Knight's office on October 30, the first workday after the meeting at Oesau's house. According to Brooks:

And he asked me, he says, well, who started this mess. He always referred to it as the mess. And I told him I couldn't tell him who started the mess. And he said that he was going to get to the bottom of it sooner or later, and then he would get rid of the people who had started the mess.

Well, he said that if we went Teamsters that his—the same thing would happen to his business [as happened to Weaver Brothers], he would go broke. You know he tried to explain to me that the Teamsters took so much money from the company that it would cause him to go broke.

Brooks next talked to Bill Knight on November 1. Knight again asked Brooks into his office; he "sat me down and brought out a piece of paper that . . . was divided down the center, and it had for the union on one side and against the union on the other side, and he asked me to sign it." Brooks signed "against the union . . . I told him anybody could sign on that side, that didn't mean they were against the union." Knight assertedly replied: "I never thought of that." Brooks'<sup>25</sup> testimony was supported by Shirley Roberts, a current employee of the Company, who also stated that Bill Knight asked her to sign the same or similar piece of paper. Roberts' testimony is also credited.

Bill Knight recalled having a meeting with Brooks on the same day or shortly after he met with Oesau. However, Bill Knight denies<sup>26</sup> discussing the Union at this meeting. He claims that he overheard Brooks saying she would be glad when this thing was over, that she could not get her work done, and that she was losing weight and nervous and upset. Bill Knight claims he met with her to inquire if Brooks would volunteer to take a week off to pull herself back together and get some of her homework done. Brooks, according to Knight, was not agreeable to his suggestion. This testimony by Knight indicates that on or about October 30, he overheard a conversation which apparently referred to the stresses the

<sup>24</sup> It is unnecessary to again discuss the credibility of Grady Knight inasmuch as there was no indication that he was present at the October 30 meeting during the alleged interrogation or solicitation of grievances. Bill Knight testified, as did Oesau, that Grady was called to the meeting after Oesau, in response to the request for grievances, indicated she had some complaints about Grady.

<sup>25</sup> The witnesses were sequestered.

<sup>26</sup> As indicated above, this testimony is not credited.

employees were experiencing due to the organizing campaign.<sup>27</sup>

Based on this statement, as well as the prior discussion of Bill Knight's reference in the November 2 speech to Grady's actions, and Oesau's, Roberts', and Bowlby's credited testimony, it is found that Bill Knight and his family knew of the union organizing campaign prior to November 2, contrary to their claims; and, as found above, they had such knowledge by October 25.

#### Conclusions

Section 8(a)(1) of the Act prohibits an employer from interfering with, threatening, or coercing employees in the exercise of their Section 7 rights to support or oppose a labor organization, or to engage in or refrain from engaging in concerted activity. This prohibition is tempered by the provisions of Section 8(c) of the Act, which states:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Supreme Court, in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617-619 (1969), balances the requirements of the two above-stated sections of the Act as follows:

Any assessment of the precise scope of employer expression, of course, must be made in a context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in §7 and protected by §8(a)(1) and the proviso to §8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

[An employer] may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take actions solely on his own initiative for reasons unrelated to

economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, eventuality of closing is capable of proof. . . ."

As stated elsewhere, an employer is free to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisals to be taken solely on his own volition." *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

Accordingly, Respondent's statements will be examined in the "context of its labor relations setting."<sup>28</sup>

The solicitation of grievances, the references to companies that went out of business ostensibly because the employees were represented by the Union, the question regarding the organizing campaign, and the request that employees sign a statement declaring whether they were for or against the Union, when considered in the context of "its labor relations setting," cannot be considered as predictions carefully made and based on objective facts, and the choice of the terms "upset" and "mess" to describe the employees' organizing activities, lead me to conclude that the interviews did interfere with, threaten, and coerce employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

Section 8(a)(3) prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization."

The credited testimony demonstrates that on October 30, the first workday after the initial organizing meeting, Bill Knight interrogated Oesau about that meeting which was held at her house. On October 30, the uncontroverted testimony demonstrates that Oesau was prevented from performing her work that morning. This action, which is not refuted by any persuasive testimony or business records, resulted in lower wages. Oesau worked on October 31, but was discharged or placed on a forced leave of absence on November 1. The assertion that Oesau, an employee since 1974,<sup>29</sup> was too nervous on November 1, a day after the flat tire incident, to continue her employ, is found to be mere pretext. These facts warrant the inference, and I find, that the Knights knew Oesau was a union supporter. *Albertson Manufacturing Company*, 236 NLRB 663 (1978).<sup>30</sup> The timing of the reduction in earnings and the forced leave of absence or termination indicates discriminatory motivation. *Liberty*

<sup>28</sup> Grady Knight's questions and statements have already been examined and the above-quoted standards have been applied.

<sup>29</sup> Oesau began her employment at K & E in 1974, and continued working until midyear of 1975, and she returned to Respondent in the following spring of 1977 and continued working until November 1978.

<sup>30</sup> It is also found that Respondent knew of the union activities of Brooks, Tannehill, Roberts, and Bowlby at this time.

<sup>27</sup> This inference is not only based on the testimony referred to herein, but is also based on repeated references Bill Knight made throughout his testimony and the record to the "upset," "nervousness," "agitation," and "harassment" caused by the union organizing campaign, and the fact that he often used these terms as euphemisms for organizing activity.

*Mutual Insurance Co.*, 235 NLRB 1387 (1978). Accordingly, it is concluded that Respondent violated Section 8(a)(1) and (3) of the Act by reducing Oesau's earnings on October 30 and ceasing her employment on November 1, because she engaged in protected concerted activities.

#### Events Occurring During November 1978

Prior to the commencement of the workday on November 2, Bill Knight admits that he terminated a group of employees. The testimony about the events the morning of November 2 is somewhat confusing. However, Knight admits three or four employees were terminated and then he claims three or four employees walked out in sympathy.<sup>31</sup> When asked why he terminated the employees, Bill Knight stated:

Because there was no way that I could find out what their problem was; none of them would tell me what their problem was. And it was getting to where it was affecting the safety of the students.<sup>32</sup>

According to Brooks, November 2 was the day after she was asked to sign a paper indicating she was either for or against the Union. She came to work at 6:30 a.m. and was called into Bill Knight's office. Bill Knight told her that he was going to have to lay her off for 2 or 3 weeks, explaining "he just said to get me out of the mess." (Emphasis supplied.) According to Brooks, her inquiry about the basis for the action was not answered, she was just told to get out of the office, and was handed a check. As she left Bill Knight's office, the other drivers were "standing around" and Brooks waved her check, saying she was fired.<sup>33</sup> She then left the building, and other drivers followed her, asking what had happened. At that time, she learned three other drivers were fired, Frank Sargent, Bernie Kale, and Ellen Northup.

As the employees were standing in the parking lot in a large group, Bill Knight came outside, "started waving his arms in the air, yelling at us and telling people to get back in their buses and that anyone that came near our group was fired."<sup>34</sup> Brooks stated that quite a few co-workers came near their group and joined the discharged employees who left Respondent's premises to attend a meeting at an Eagle River restaurant called the North Slope.

The meeting at the North Slope Restaurant was photographed by a newspaper reporter and this picture was published. The persons identified in the photograph were

Bernie Kale, Doris Miller, Sandra Brooks, Tim Amerson, Darlene Teegarden, Ralph Hemingway,<sup>35</sup> Shirley Roberts, Elaine Bowlby, Dolores Oesau, Margaret Tannehill, Noretta Kamholz, Frank Sargent, and Conner.

Despite Bill Knight's claim that Sargent "quit more or less," Sargent claims he was fired. According to Sargent,<sup>36</sup> he was laid off on November 2 by Bill Knight,<sup>37</sup> who told him that he was being laid off because he was a retired Teamster and could be fined for staying on. Sargent left Respondent's premises and went to the meeting at the North Slope Restaurant.<sup>38</sup>

Knight's explanation of Sargent's cessation of employment is that Sargent told him on October 28 or 29 that he wanted to be paid in cash without any records or deductions and that Sargent quit when Knight refused to pay him in that manner, and picked up his check on November 1 or 2. Although this version would explain Sargent's failure to continue his employment after the reinstatement of most employees on November 2, Knight's testimony is not credited based on prior admission that he terminated the employees because "none of them would tell me what their problem was" and the lack of any controverting testimony concerning Sargent's statement that he attended the afternoon employee meeting on November 2, an act an employee that had quit on October 28 or 29 normally would not do as it would be inconsistent with the decision to quit. For these, as well as the other previously stated reasons, Bill Knight's testimony is not credited. The remark that the termination, layoff, and/or cessation of work was to protect Sargent from the Teamsters was not shown to be based on objective fact, and such a statement, it is concluded, was designed to raise the fear of reprisal against all employees who may become members of the Teamsters, in violation of Section 8(a)(1) of the Act.

Also, Sargent's version was supported by Tannehill,<sup>39</sup> who testified that, when she arrived at work on November 2, she met Frank Sargent coming out of Respondent's building and he had informed her that he had been fired as had Brooks and several others.<sup>40</sup> At that time, according to Tannehill, no reason was given for the terminations.

<sup>35</sup> Brooks was unsure of this employee's last name.

<sup>36</sup> Sargent was employed by K & E for 3 months in 1977 and at the beginning of the 1978 school year. There were no specific complaints about his work.

<sup>37</sup> Sargent believes Bobbie Knight was also present at the meeting.

<sup>38</sup> Sargent did not return to work at Respondent for reasons which are unclear. As will be discussed in greater detail below, most employees were reinstated on the afternoon of November 2, apparently including Sargent, but Sargent said he sat at the back of the room and could not hear well. This does not explain why he failed to return to work. Therefore, any unlawful discharge will be found to have lasted from the morning of November 2 to the afternoon of November 2. The General Counsel has failed to explain why Sargent had not returned to work the afternoon of November 2, and therefore has not met the burden of showing that the reinstatement offer, which apparently included Sargent, was not sufficient.

<sup>39</sup> Barbara Ellen Northup's testimony also supported Sargent's version.

<sup>40</sup> Knight said the reason for Sargent's presence on November 2 was that he drove Tannehill to work. However, Tannehill, a current employee, indicated she arrived after Sargent was fired, and her testimony is credited.

<sup>31</sup> Knight asserts that he did not terminate Ellen Northup, Earl Northup, Margaret Tannehill, or Frank Sargent that day.

<sup>32</sup> Knight's admission that he was attempting to "find out what their problem was, none of them would tell me" further supports the above finding that Bill Knight engaged in unlawful interrogations. The use of the phrase "their problem" is the same or similar to Grady's term for the basis of his inquiries. The phrase is found to refer to the employees' organizing activities.

<sup>33</sup> Teegarden's testimony, which is credited, substantiates Brooks' version of her discharge.

<sup>34</sup> This threat was not shown to have been justified by the circumstances prevailing at the Company that morning. There was no showing that the threat was made during working hours. The intent, as clearly exhibited in the context of the case and method of communication to the employees, was to restrict or prohibit communication by employees with known union organizers in violation of Sec. 8(a)(1) of the Act.

Tannehill recalls speaking with Bobbie Knight that morning in the drivers' room. It is asserted that Bobbie Knight threatened that, if any of the drivers mingled with those persons who had been fired, they would be considered fired and that the employees were to immediately go out and get on their buses "and not ask questions." After this statement, Bill Knight went outside and Tannehill followed to see what was going on. Since she had been told that if she left the room to talk to the discharges she would be automatically fired, as she turned to walk out the door, Bobbie Knight<sup>41</sup> ripped her name tag off the board.<sup>42</sup> According to Tannehill, both Bobbie and Bill Knight were calmly ripping the names of some employees off the board. Bill Knight's testimony that Tannehill was not terminated November 2 is not credited. Bobbie Knight did not directly controvert Tannehill's testimony; she merely denied wrongdoings, usually in response to leading questions.

Bill Knight also testified that Ellen Northup was not terminated on November 2. Contrary to Bill Knight's testimony, which is not credited, Northup stated that she inquired of Bill Knight why Brooks, Kale, and Sargent were fired and Knight assertedly replied that it was "none of your damn business, now get to work." B. E. Northup again asked why they were fired and told Bill Knight that what he was doing was despicable, that "you don't fire people for no reason." Bill Knight assertedly again told her it was "none of her goddamn business, Ellen, now get to work or you are fired too." She again repeated that his actions were despicable and was then told by Bill Knight that she was fired and to get off his property, which she did. Knight hollered as they were leaving that "if you talk to a bus driver, they are fired." She then called the radio stations to inform them that there probably would not be any school because the school buses would not be running.

B. Northup's testimony was supported by Bernie Kale who testified that on November 2, as he approached the building,<sup>43</sup> Bill Knight came out, handed him his check, and said, "Here's your check, get off my property." Kale said, "Okay," and started walking toward his car when he heard B. E. Northup shouting at Bill Knight, saying, "that that was the most disgusting thing she had ever seen." Bill Knight admitted discharging Kale.

Then, according to Kale, Tim Amerson asked why Bill Knight was firing employees, and "he replied it was his own reason, it was his company, he could do what he wanted." Kale's testimony on this point is credited based on demeanor, the consistency of this version with other renderings of the event although the witnesses were sequestered, and the inherent probabilities as reflected in his wife's statements earlier that day as well as his own comment later that day as reflected in Appendix A. [Omitted from publication.]

<sup>41</sup> Teegarden testified that she saw Bobbie Knight rip Tannehill's name off the board, and her testimony is credited, based on demeanor, clarity of recollection, and her status as an employee at the time of her testimony. Tannehill's testimony is credited for the same reasons.

<sup>42</sup> There was a very large board in the drivers' room which had all the drivers' names and all the bus route numbers on it.

<sup>43</sup> Sandra Brooks, Frank Sargent, and Tim Amerson were assertedly within hearing distance.

In sum, it is found that Respondent violated Section 8(a)(1) of the Act by informing an employee that they were being laid off to get that employee out of the Union, by telling Sargent that he was laid off or discharged because he was a member of the Teamsters Union, and by telling employees that they would be discharged if they spoke with or were seen associating with any of the above-mentioned discriminatees rather than going straight to their buses without asking questions.<sup>44</sup> Respondent issued an employee handbook prior to or at the commencement of the 1979-80 school year which included the no-congregating rule plus incorporating the above-described benefits, thereby codifying its coercive actions in violation of Section 8(a)(1) of the Act.

It is further found that, on November 2, Respondent violated Section 8(a)(3) and (1) of the Act by laying off, suspending, discharging, or otherwise reducing or eliminating the employment of Sandra Brooks, Frank Sargent, Ellen Northup, Margaret Tannehill, and George Kale because they were engaging in protected concerted activity.

On the afternoon of November 2, Respondent held an employees' meeting which included those individuals previously laid off, terminated, or otherwise prevented from working, and several representatives of the Anchorage School District, including Russell Knodel, who recorded a portion of the meeting. As mentioned previously, a transcript of the recording has been appended hereto.<sup>45</sup>

Bill Knight opened the meeting by apologizing for his actions that morning, explaining: "Now, I don't mind, but what got me was the agitation that was going on while I was paying you, and I don't like it. And I won't stand for it." This admission is one factor leading to the conclusion that Respondent had knowledge of the organizing campaign prior to November 2, contrary to Bill Knight's denial of such prior knowledge. Furthermore, this statement, cojoined with Knight's admission that he fired several employees that morning because they would not tell him "what their problem was," the previously discussed interrogations and threats, the further admission that the discharges that day were done "in a rage . . . . It wasn't done under a good pretense," clearly demonstrates that the motive for the discharges was the protected concerted activity of these employees, in violation of Section 8(a)(3) and (1) of the Act.

Also at the November 2 employee meeting, Bill Knight announced the implementation of a profit-sharing plan. The General Counsel alleges that the implementation of the profit-sharing plan was a violation of Section 8(a)(1) of the Act. While it is admitted by Respondent that implementation of the profit-sharing plan was dis-

<sup>44</sup> There was no clear showing that taking time to talk to or associate with any of the discriminatees would have made any or all the employees late on their assigned runs. The time of the incident was not clearly stated nor did Respondent state or otherwise demonstrate when the various drivers had to depart the bus garage in order to perform their duties in a timely manner.

<sup>45</sup> See Appendix A. [Omitted from publication.] The recording was reviewed five times by me, and the transcript, due to the conditions under which the recording was made, is as accurate as conditions permit, such as the need to use standard listening equipment.

cussed at this meeting, K & E also argues that profit sharing was discussed and developed well before the commencement of any union organizing activity. The record supports this contention. The tape recording of the meeting reveals that the computation of contributions and most if not all of the other details had been completed before November 2. Furthermore, Bill Knight refers to a discussion he had with Bowlby the previous summer wherein the profit-sharing plan was discussed. However, this is not an exculpatory defense unless Respondent can explain the timing of the announcement. See *N.L.R.B. v. Pandel-Bradford, Inc., Styletek Div.*, 520 F.2d 275, 280 (1st Cir. 1975), and *J. P. Stevens and Company, Inc.*, 247 NLRB 420 (1980).

The General Counsel has established a *prima facie* case of a violation by virtue of the timing of the announcement. There was no documentary evidence relative to when the plan was submitted to a bank or similar institution or when Respondent perfected the plan sufficiently to permit implementation. Respondent does admit that the plan could not be implemented on November 2. It is therefore concluded that Respondent failed to adequately explain its decision to announce the planned initiation of the profit-sharing plan at the November 2 meeting. Accordingly, it is found that Respondent failed to rebut the inference of improper interference with the organizing campaign flowing from this announcement at the November 2 meeting, a day when several employees were discharged, suspended, laid off, or otherwise deprived of their positions because of the union organizing campaign. Furthermore, the details of the profit-sharing plan were not announced and Respondent failed to specify when, if ever, the profit-sharing plan was implemented. It is therefore concluded that the announcement violated Section 8(a)(1) of the Act. See *D'Youville Manor Nursing Home*, 217 NLRB 173, enfd. 526 F.2d 3 (1st Cir. 1975); *N.L.R.B. v. Arrow Elastic Corporation*, 573 F.2d 703, 706 (1st Cir. 1978); *Litton Dental Products, Division of Litton Industrial Products, Inc.*, 221 NLRB 700, 701 (1975), and *Fidelity Telephone Company*, 236 NLRB 166 (1978).

The motive behind this announcement was clearly demonstrated in Knight's statement of November 2 as follows:

Okay. Let me—I've got one other thing I want to go over with you. Since we're coming back to peace here, this is going to be—I don't think I better go into this at this time.

Now, what I'm gonna do is speak on—on an important matter that affects your future and your families and the company here. I know that some of you recently have been contacted by the Local 959. And what I want to assure you—you know my position. I'm strongly opposed, your company. Now, when a union starts out on its campaign trail and tries to organize employees, they make a lot of promises and misleading statements. The union will always promise that—they'll always outpromise the company. That's a tactic that I'm sure you all—you're all aware of. After all, they're not directly

responsible to the employees' needs, as we are. Promises are cheap, but the facts is that it can't guarantee nothing. The Teamsters cannot force your company to agree to anything the company is, unwilling to or unable to do.

Now, you all know that your company tries to provide steady work, opportunity for all of its employees. We are constantly improving because we know that a local group of employees is our best asset, and it's necessary to our continued success. You can see a good example of that in the pension plan that we have been discussing today and week before last and the week before that. You received pay increases from this company and you will receive a pension and profit-sharing plan. You got all of the improvements without any strikes, without one day of lost pay. You did not have to pay anybody any dues or any assessments or any fines or fees. The Teamsters can force you to pay dues each month when they have a union shop clause. And the Teamsters can force you to pay a high initiation fee to join the union.

The timing of the announcement of the profit-sharing plan is shown to have been planned to persuade the employees to withhold or withdraw their support of the Union because immediately thereafter, Respondent announced the implementation of several other benefits. After stating that the profit-sharing plan had been approved and accepted, and admitting that it was not quite ready for execution, he announced the implementation of a sick leave policy and a \$50 contribution to the mandatory yearly physical examination and license renewal. This grant of benefits is a violation of Section 8(a)(1) of the Act for, as the Supreme Court stated in *N.L.R.B. v. Exchange Parts Co.*, 405 U.S. 409 (1964):

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Respondent, likewise, has failed to establish a legitimate business reason to the timing of the announcement to counter the implication raised from the General Counsel's *prima facie* showing that the likely motivation was the desire to counter the Union's organizing campaign.

In sum, I find the November 2 announcement of a profit-sharing plan, implementation of sick leave, and a \$50 company contribution to the employees as reimbursement, partial or otherwise, for expenses incurred in getting the mandatory yearly physical and license renewal were violations of Section 8(a)(1) of the Act. Additionally, promising of benefits at the same moment the captive employee audience is told that the Union could force the Company to agree to any matter it is unwilling to agree to, characterizing the Union's promises as "cheap," mentioning the granting of benefits without the need to strike, and the assessment of dues and other costs are classic examples of the "fist in a velvet glove" and

constitute a separate violation of Section 8(a)(1) of the Act. See *Daybreak Lodge and Convalescent Home, Inc.*, 230 NLRB 800, 802 (1977).

Another matter discussed during the November 2 meeting was the organization of an employee grievance committee. The matter was raised when Brooks inquired: "How are we gonna know that after we vote this down, you're not gonna can us all over again and replace us?" Bill Knight replied: "Okay. What I'd like to see the drivers do—we can do it at this meeting or the next one. I'd like to have a grievance committee set up and let you people elect it so that you will come to me, one, two, three, four, five—it's immaterial how many you put together."

Bill Knight asserts that the grievance committee was suggested by Knodel. Knodel did not have a clear recollection of making such a suggestion; and Knodel's comment near the end of the meeting where he referred to the grievance committee as "the suggestion that he had" indicates that the "he" is Bill Knight. Accordingly, it is concluded that Knodel did not initiate the idea. Additionally, there was no showing that Knodel could or did require the formation of such a committee. Therefore, even assuming *arguendo* that Knodel did make the suggestion, the final determination was Respondent's.

#### Meetings of November 6 and 13

All the employees and the grievance committee met with Knight twice, November 6 and 13. Some of the witnesses confused the meetings in their testimony, but such confusion is not found to be a basis for discrediting their testimony as other than a normal compression of events through memorialization.

According to B. Northup, whose testimony is credited,<sup>46</sup> Respondent held a drivers' meeting on November 6 attended by all the drivers, the mechanics, and the three Knights. Bill Knight discussed his desire to provide "the best for all the drivers." Then he introduced his wife as the new manager, or second-in-command.<sup>47</sup>

Bill Knight then stated that there were to be new policies at K & E, that the employees were, henceforth, to go by the school bus driving manual.<sup>48</sup>

<sup>46</sup> B. Northup testified in a very direct, forthright manner, without guile, exhibited clear recollection and candor. Also, Oesau, Teegarden, Kale, and Tannehill, although the witnesses were sequestered, affirmed Northup's version which was not clearly and convincingly refuted by Respondent.

<sup>47</sup> This announcement clearly demonstrates Bobbie Knight's supervisory status as of November 6. It is also found that Bobbie Knight was a supervisor or an agent of Respondent on November 2 inasmuch as her dismissal of an employee was not contested on the basis of her lack of authority to terminate drivers but, rather, it was readily accepted by both the employees and Respondent. This finding is further supported by the discernible involvement of Bobbie Knight in assisting Bill Knight in conducting the November 2 meeting, and at times directing the course of the meeting, assuming control from Bill Knight. Accordingly, it is concluded that, as here pertinent, Bobbie Knight was a supervisor from at least November 2, 1978, as defined in Sec. 2(11) of the Act.

<sup>48</sup> The complaint fails to allege that this statement is violative of the Act and the matter is not raised in either brief. This matter will be considered on its merits, for there was no objection to testimony; the matter was fully and fairly litigated; and the events are sufficiently related to the subject matter of the complaint. See *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165.

Bill Knight then stated that he wanted the employees to select a grievance committee to present grievances and negotiate with him. He also suggested that the employees form an association, have their own union, which he would assist them in starting.<sup>49</sup> Bill Knight also said that the employees did not need the Teamsters or any other union, that they could do better on their own, and that Knight would contribute the necessary funds as well as help the employees "get a lawyer."

According to B. Northup, Bill Knight then said: "I can't run it, but I would direct it and I could give you advice and I won't charge you anything for it and help you do this, and then you could negotiate with me for things and maybe we could set up some dental stuff and some better medical coverage."

At this point in her testimony, Northup became confused as to when the following events occurred, the employee meeting of November 6 or 13. However, she believed that it was at the November 6 meeting that Bill Knight announced the suspension of all seniority for at least 2 weeks. He also said that he was going to modify the existent assignment of runs to even out the earnings so that newer employees could earn as much as employees with more tenure. Knight admitted announcing that seniority would no longer be used in the assignment of regular routes and extra runs. When asked if he told the grievance committee or the employees that they should get together and that he would negotiate with the committee, Bill Knight replied: "To come up with the grievance, yes."

Dolores Oesau presented the grievances to Bill Knight at the November 13 meeting. The grievance committee was elected at the November 6 meeting, which was attended by most if not all of Respondent's employees. It drafted a list of 10 grievances, and presented the grievances on November 13 to Bill Knight who stated that he would grant only two items.<sup>50</sup>

Upon these facts, I conclude that the grievance committee is a labor organization within the meaning of Section 2(5) of the Act and that Respondent dealt with the committee concerning terms and conditions of employment. See *Edmont, Inc.*, 139 NLRB 1528 (1962), wherein the Board found that: "The fact that management was under no compulsion to yield to any of the Committee's suggestions does not detract from the fact that the parties dealt with each other in meeting and discussing them . . .," citing *N.L.R.B. v. Cabot Carbon Company and Cabot Shops, Inc.*, 360 U.S. 203, 210-213 (1959).

It is also found that Respondent dominated or supported the grievance committee since it was formed at Bill Knight's suggestion and urging,<sup>51</sup> that the committee was elected at a meeting called and presided over by Bill Knight, that Bill Knight offered legal and financial sup-

<sup>49</sup> Several employees, including Oesau, recalled Knight saying he always wanted to own a union.

<sup>50</sup> Knight claimed all the other grievances were already established policy. The results of the November 13 meeting are reflected in Oesau's notes taken contemporaneously with the presentation of the grievances and introduces Resp. Exh. 2. These notes mention Bill Knight's statement that he understands finance and unions, that he would like to own a union.

<sup>51</sup> See *American Taro Corporation*, 242 NLRB 1230 (1979).

port in lieu of dues, as an alternative to the Union during the preelection period, which constituted unlawful assistance in violation of Section 8(a)(2) and (1) of the Act. *Atco-Surgical Supports, Inc.*, 157 NLRB 551, 555 (1966).

To further emphasize his control of the situation, Bill Knight suspended seniority<sup>52</sup> as a means of making route assignments and announced some senior employees would suffer financially, thereby emphasizing the employees' dependence upon Respondent's largesse, and announced that, forthwith, the Company would follow the school bus driving manual. The institution of more stringent rule enforcement is highly coercive, particularly in the context of Respondent's labor relations setting, and the statement that the employees did not need the Teamsters or any other union, but could bargain directly with Bill Knight, constitutes a threat of loss of Section 7 privileges in retaliation for their union activities, which is violative of Section 8(a)(1) of the Act. *Keller Manufacturing Company, Inc.*, 237 NLRB 712 (1978).

During the November 2 meeting, Bowlby's, Oesau's, and Brooks' employment status were discussed. All other discriminatees were immediately reinstated. For ease of discussion, the contents of these discussions will be incorporated in the sections devoted to each alleged discriminatee as well as each individual already found to have been a discriminatee who was allegedly further discriminated against.

#### D. Additional Allegations of Discrimination

After the November 2 meeting, the General Counsel alleges that Respondent laid off, suspended, discharged, placed on leave of absence or standby status, or otherwise reduced the employment and earnings of Dolores Oesau, Sandra Brooks, Barbara Ellen Northup, George (Bernie) Kale, Noretta Kamholz, Shirley Roberts, Darlene Teegarden, and Margaret Tannehill, and has failed and refused to reinstate Elaine Bowlby after her leave of absence expired.

In analyzing these allegations, cognizance is taken of Respondent's policies. For example, Grady Knight stated that Respondent had no practice or policy requiring termination in lieu of counseling in an attempt to correct employees who have committed infractions of the rules promulgated by the Company, state, or school district.

Another factor to be considered is motive. Based on the preceding discussion of events, as well as other evidence of record,<sup>53</sup> it is found that Respondent held animus toward all unions and the Teamsters in particular, and this attitude was the primary motive for most if not all of his actions. As was previously found, Respondent had knowledge of the organizing activity on or about October 25. Therefore, only the element of motive will

be discussed in the following sections dealing with the individual allegations of discrimination.

#### 1. Dolores Oesau

It has been previously concluded that, on October 30, Respondent reduced Oesau's employment and earnings by stopping her from working in the morning, and on November 1 she was fired.<sup>54</sup>

During the November 2 meeting, Bill Knight said that he would not reinstate Oesau because "she got to where every time she'd come in the door she was either crying or shaking." Oesau asked who was crying, but Bill Knight did not reply directly, rather he stated it was hazardous and referred to the blowout she had a couple of days earlier.

Oesau replied that she had previously informed him that she felt sick that evening, and she did not know if the symptoms were attributable to the flu or the blowout. Bill Knight did not respond to this explanation.

When asked during the meeting by an unidentified male employee why he could not reinstate Oesau, Bill Knight stated: "Not until—not until she gets settled down, resettled down." When the question was asked what that meant, Bill Knight replied: "Well, you're kind of a nervous wreck. I don't know—it could have been part of it brought on by the agitating and irritating going on around here."<sup>55</sup>

Knight again was asked who was crying and he refused to elucidate. This failure indicates that the employee described as having been reduced to tears was not Oesau. Then various other matters arose, when Tim Amerson stated that there was no reason to fire Oesau and that the only time he saw her upset was after coming out of Bill Knight's office and not from driving a bus. Amerson inferred that, if there were any harassment, it was Bill Knight harassing Oesau. Bobbie Knight then suggested that Oesau get a doctor's statement indicating that she was not nervous or upset. Bill Knight said that Oesau was "getting to the point that you've been dangerous on the road." Bobbie Knight then stated: "Well, some can cope and some can't. What you saw this morning was a mass hysteria of not coping."

These statements are again indicative of the use of euphemisms, in this instance the term "hysteria," for protected concerted activity. Several employees at the end of the meeting refused to drive unless Oesau was reinstated. The meeting then broke up and, according to Oesau, whose testimony is credited for the reasons stated hereinabove, Knecht<sup>56</sup> asked to talk to Bill Knight because the drivers would not go back to work if she were not reinstated. Oesau then went to Mr. Knight's office and requested reinstatement, and Bill Knight rehired her. Oesau then told Bill Knight that he knew she was not a nervous person and he just shook his head yes.

<sup>52</sup> That Respondent took this action is also confirmed in Oesau's notes of the meeting, Resp. Exh. 2.

<sup>53</sup> For example, Earl Northup, B. Northup's husband, testified that he asked Bill Knight why so many drivers were gone, and Knight replied that he was going to keep firing until he found the ones that had started the Union. Based on demeanor, clarity of recollection, and testimony, the current status of E. Northup as an employee of Respondent, and the fact that his testimony is similar to the testimony of several other witnesses who heard the same or similar reasons given by the Knights for discriminatory actions, E. Northup's testimony is credited.

<sup>54</sup> Bill Knight stated he "did not think she was terminated . . . she would have been on a leave of absence." As will be seen hereinafter, the use of unrequested leaves of absence was a method often employed by Bill Knight to terminate, reduce, or otherwise adversely affect employment of union adherents.

<sup>55</sup> As previously discussed, it is concluded that Bill Knight uses such euphemisms for the employees' union organizing activities.

<sup>56</sup> Knecht was a former manager of Respondent.

When Oesau returned to work that afternoon and for a few days following, she was assigned the same bus runs she held prior to her discharge. On November 6, prior to but on the same day as Bill Knight held the second employee meeting discussed above, Oesau was advised by Bill Knight that employees who were assigned double runs would only get single runs in the future to enable new hires to earn more money.<sup>57</sup>

On November 9, when she reported to work, Grady Knight informed her she would not be driving and that his father wanted to see her. Oesau was then told by Bill Knight that he wanted her to sign a leave-of-absence slip "because of this union mess that things were going to get awfully sticky and he didn't want me all up-tight about it." Oesau refused to sign a leave-of-absence slip, telling Bill Knight that she did not want to take a leave of absence and, if she were to be denied employment, this proposed method would not allow her to draw unemployment benefits. Oesau then suggested that she be fired, but Bill Knight stated he did not want to fire her. Bill Knight then sought the advice of his wife who then decided to just put her on standby.<sup>58</sup>

Knight's claim that he "let [Oesau] off on a leave of absence to complete her schooling in real estate" is not credited for the above-stated reasons.<sup>59</sup> That Respondent now argues that her "nervousness" created a safety hazard, several days after the accident and in contradiction of the decision to reinstate her on November 2, demonstrates the obfuscating nature of the reasons given by Respondent for the discharge and it is hereby concluded that Oesau was discharged on November 9 for antiunion motives in violation of Section 8(a)(3) of the Act.<sup>60</sup>

Oesau returned to work at K & E on April 16, 1979, after receiving a letter advising her that she had 7 days to make an appointment with Respondent<sup>61</sup> to be rehired. Oesau testified that "[p]rior to returning to work," she received a telephone call from Schmid and met with both Schmid and Bill Knight, who informed her that she

had the job, but that Respondent had placed several conditions preceding that had to be met before she could be rehired. One condition was that she stop her extra activities, and the other was that she write a statement to the effect that she was now mentally and physically capable of handling her job.<sup>62</sup> Oesau replied that she would not write such a statement and that she had always been physically and mentally able to perform her job and to handle the extra activities she engaged in. Oesau refused to return to her job on those terms. She was then rehired without meeting those conditions.

When Oesau returned to work, she was not assigned the same series of runs she had on November 9, 1978. The runs assigned in October and November 1978 remunerated her at the rate of \$49 a day, including what is referred to as an activity run.<sup>63</sup> The work assignments in April 1979 resulted in daily compensation of \$28. The reason for the diminution in assignments was not clearly explained and is found to be motivated by unlawful reasons in violation of Section 8(a)(3) of the Act.

Schmid stated that he informed Oesau that he would not be able to give her back her double runs, but stated that he would work toward that end.<sup>64</sup> Oesau was assigned as a driver and also as a driver's aide.<sup>65</sup> Oesau was assigned as an aide to Dixie Alene Armstrong, and Schmid admitted that Oesau and Armstrong did not get along and that he told Oesau the problem "is something that can be worked out." Apparently, according to Schmid, Oesau misunderstood his comments during this conversation about not worrying about the personality conflict she was having with Armstrong for she refused the following day to take the run.<sup>66</sup> Armstrong also reflected in her testimony that she had a personality conflict with Oesau and complained that Oesau failed to assist her in controlling the children. On the second afternoon Oesau was to assist her, she informed Armstrong she was not riding with her anymore. Schmid tes-

<sup>57</sup> It is noted this testimony is consistent with the announcement subsequently made at the employee meeting held that evening, and the testimony is credited.

<sup>58</sup> Respondent failed to show that Oesau was requested to work as a standby driver during this hiatus in her employment. Therefore, the significance of the standby designation is unclear in this instance and is found to be another method for terminating employment.

<sup>59</sup> As will be discussed more fully in the section analyzing the charges relative to Elaine Bowlby, Respondent did not have a clear leave of absence policy and, in fact, denied at some points in the testimony that leaves of absence were permitted. Respondent did not refute Oesau's contention that she did not request a leave of absence. The duration of the ostensible leave was not defined, nor was the need for such action clearly presented by Respondent inasmuch as they described the position, without contradiction, as a part-time job. Accordingly, it is hereby concluded Respondent improperly used the term "leave of absence" or standby as euphemisms for its real action of layoff or discharge.

<sup>60</sup> The specious nature of the reason for discharge is further demonstrated by Bill Knight's testimony that sometime right after her blowout he advised Oesau that the best way of handling an accident is to continue working. He also admitted that "she sort of had a flu or common cold coming on." This testimony further supports the above finding that the reasons given by Respondent for its discriminatory actions were pretextual.

<sup>61</sup> Respondent had hired a new manager in March in 1979, Robert Schmid. It is uncontroverted that Schmid is a supervisor as defined in Sec. 2(11) of the Act.

<sup>62</sup> Schmid, according to Oesau, did not define the term and she understood the term to refer to her horseback riding, hiking, and other hobbies. Schmid admitted discussing outside activities with her but denies requiring that they be eliminated or curtailed. After this discussion, Oesau claims that Bobbie Knight removed this condition, but insisted upon compliance with the second condition, the written statement. Bobbie Knight did not refute Oesau's testimony on this point. Oesau's testimony is credited.

<sup>63</sup> The term "activity run" was defined in various ways by different witnesses. It appears that generally, as used in testimony, these assignments are to accommodate after school activities, such as transporting various sports team members home after practices. It is found that some of these runs were regularly assigned to particular employees. Oesau's uncontroverted testimony is that she was assigned an activity run in the fall of 1978, and, although it was not necessary to drive it every day, she had to wait to ascertain if her services were necessary, and after reviewing her pay, she discerned that she was utilized an average of almost 4 evenings a week.

<sup>64</sup> This claim of inability to restore Oesau to the same or similar runs was not supported by any documentation.

<sup>65</sup> Driver's aides are assigned to assist the drivers of special education runs for these are children that need quite a bit more attention and supervision. Driver's aides are not paid as much as bus drivers.

<sup>66</sup> Schmid asserts that resolution of the problem was pending, to the best of his recollection, the outcome of his investigation. However, there is no clear showing that Schmid expressly or explicitly related to Oesau this understanding about the resolution of the personality conflict.

tified that he "got into it and named Julie to ride with me."<sup>67</sup>

Oesau was not reassigned as a driver's aide and there was no showing that she was disciplined at the time of or shortly after the incident, even though Schmid claims he considered her actions to be "insubordinate." Oesau worked until the school year ended. Prior to the commencement of the 1979-80 school year, Schmid sent all drivers, including Oesau, a letter<sup>68</sup> stating that, if they intended to return to work for K & E, they had to renew their bus driver's permit and the forms for their physical examinations. When Oesau went to K & E to get the necessary forms, she was told by Schmid that she was not going to be hired because she was "psychologically unfit for the job."

Schmid wrote on an employee evaluation form which he devised for use prior to and during the 1979-80 school year: "Delores, since she has returned to work at K & E, has caused me great concern regarding her emotional stability to serve as a school bus driver transporting children in the safest possible manner. She seems extremely high strung and nervous." At the time he made this evaluation, Schmid stated he was not totally aware of the length of time Oesau was previously employed by Respondent. This response lends grave doubt to the evaluation for it indicates that the assessment was made without studying possibly pertinent employment history. Additionally, the evaluation does not mention insubordination; rather it harkens back to the old saw of "psychologically unfit," a basis which is again found to be pretext.

In addition to not considering length of employment, Schmid could not recall seeing Oesau's driving or accident records for the past years. Also, his letter to Oesau about getting ready for the next school year is inconsistent with the evaluation, and his explanation for sending such a letter is considered highly improbable.<sup>69</sup>

Furthermore, Schmid failed to clearly state the basis for his evaluation, he did not describe how many times he observed Oesau or the nature of her activities during those observations which resulted in his assessment. If this assessment stemmed from the driver's aide incident, Respondent's continued reliance on Oesau in the assigned run the rest of the school year is unexplained, and again exhibits inconsistencies of such a nature as to warrant discrediting the testimony. Accordingly, Schmid's testimony is not credited, and the grounds given for the failure to rehire Oesau are found to be simulated to obfuscate the actual motive which is hereby found to be based

<sup>67</sup> This testimony contradicts Schmid who claimed that he saw Oesau at a desk and in the presence of Armstrong when Oesau refused to take the run. Schmid claimed that he personally had to go with Armstrong. Schmid's demeanor, lack of clear recollection, and tendency toward exaggeration and lack of clarity and candor lead me to credit Armstrong's statement that Schmid, her supervisor, did not ride with her that day. Schmid admitted to a "vague awareness of NLRB charges having been filed against K & E?" and it is found that he had knowledge of Oesau's concerted protected activities.

<sup>68</sup> He does not recall if he sent one to Brooks.

<sup>69</sup> He stated it was a reminder in case the employee he knew would not be rehired wanted to work for some other school bus company. Whether such other companies existed and needed drivers is not a matter of record; hence, this reasoning is considered to be untrue and masks the basis for the decision.

on Respondent's demonstrated union animus, in violation of Section 8(a)(3) and (1) of the Act.

## 2. Sandra Brooks

As discussed above, Brooks was discharged and reinstated on November 2.<sup>70</sup> On November 6, after Bill Knight observed Brooks talking to Frank Sargent<sup>71</sup> in the high school parking lot, Grady Knight, upon her return to the bus called her into his office.<sup>72</sup> Brooks was informed by Grady Knight that his "[d]ad had decided that from now on they were going to take all activity runs and give them to standby drivers so that they would have more money."<sup>73</sup> Brooks had been getting activity runs with regularity up until that time. At the employee meeting held that evening, Brooks asked Bill Knight whether it was true that he was taking away "everyone's activity runs to give to the standby drivers." Bill Knight replied in the affirmative. As found hereinbefore, the change in allocating work was motivated by Respondent's union animus. Consequently, it is found that the reduction of Brooks' employment on November 6 was violative of Section 8(a)(3) and (1) of the Act.

On November 10, Brooks was called into Bill Knight's office and told that he was taking away her kindergarten run. Brooks inquired why he further diminished her employment, and he replied that he did not really want to discuss the matter at that time. Prior to November 6, Brooks had been earning \$52.70 a day, and after November 10 her earnings dropped to \$28 a day.<sup>74</sup>

On November 20, while in the drivers' room, Brooks was given a termination slip by Bobbie Knight, which states that the action was taken for health and safety reasons.<sup>75</sup> Brooks then spoke to Bill Knight who said she had lost 4 pounds and that was what led to the health

<sup>70</sup> Brooks commenced her employment as a school bus driver for K & E at the beginning of the 1974-75 school year and remained as a regular employee until November 2, 1978.

<sup>71</sup> Sargent was in his private vehicle. The conversation with Brooks was not presented with sufficient detail to warrant any findings or to lend support to any contentions.

<sup>72</sup> It is noted that Respondent does not refute the assertion that Grady still had an office on November 6, or that he was acting, at the very least, as an agent within the meaning of Sec. 2(13) of the Act.

<sup>73</sup> Grady Knight did not refute this testimony.

<sup>74</sup> Respondent did not produce any payroll or other documentary evidence to refute or otherwise contest Brooks' testimony. This failure of Respondent to produce such historical evidence regarding methods of route selection, the number of runs each particular employee were assigned, and the employee's earnings from these assignments has been previously noted and warrants the taking of an adverse inference. As stated in *Northern Packing Co. v. Page*, 274 U.S. 65, 74, (1927):

[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.

See also *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684, 694 (5th Cir. 1970); *Washington Gas Light Co. v. Biancaniello*, 164, 167, 183 F.2d 982, 985 (D.C. Cir. 1950); *in re Chicago Rvs. Co.: People of State of Illinois v. Sullivan*, 175 F.2d 282, 290 (7th Cir. 1949).

<sup>75</sup> The recurrence of this reason as a basis for Brooks' discharge, after being utilized in Oesau's discharge, is noted and provides one of the bases for finding this reason pretextual. As was the case with Oesau, Brooks was discharged on November 2, ostensibly for being too light, yet, by the afternoon of November 2, unlike the Oesau case, Brooks was readily rehired without any showing that she gained weight during those few hours.

and safety concerns and resulted in her termination.<sup>76</sup> Brooks admitted losing 4 pounds due to nervousness caused by the union organizing campaign and the events attendant thereto, as described in some detail herein. Brooks is a slight woman. However, her claim that her weight fluctuated, cojoined with Respondent's failure to indicate any physical inability to perform the job resulting therefrom, and the overall labor relations setting, warrant a finding that the reasons for her termination are pretextual.<sup>77</sup>

On April 7, 1979, Brooks received a letter offering her reinstatement and allocating 7 days upon receipt to reply. She, like Oesau, had to meet with Schmid and Bill Knight prior to being rehired. Brooks was given her former high school and grade school runs, and commented upon the absence of her kindergarten and activity runs. She cannot recall what, if any, reply was made to her comment.<sup>78</sup>

Brooks was fired the last day of the school year, June 1, 1979, by Bobbie Knight. The reason given for Brooks' discharge was that she gave grade school children permission to bring water pistols and shaving cream aboard the bus the last day of the school year. Brooks admitted she had done so and stated, without refutation, that she acted similarly in the past.<sup>79</sup>

According to Respondent, prior to the commencement of the afternoon runs, Bobbie Knight had an interview with Brooks in Schmid's office in response to a telephone call from Clausen, the principal of Chugiak Elementary School regarding the confiscation of water pistols from some of the children.<sup>80</sup> Bobbie Knight asked Brooks about the incident and Brooks explained that "most of us let our children do this on the last day."<sup>81</sup>

<sup>76</sup> Bill Knight testified that he gave Brooks a leave of absence because she was nervous and upset. The use of the euphemisms, leave of absence for termination, and nervous and upset in lieu of union organizing activity, have previously been noted.

<sup>77</sup> Another basis for finding Respondent's reason for the discharge was pretextual is statements made by Bill Knight during a fact-finding conference with the Anchorage Equal Rights Commission. Shortly after her discharge on November 20, Brooks filed a complaint with the Anchorage Equal Rights Commission alleging that one of the reasons for her discharge was her small feminine stature. During an investigatory interview in January 1979, Bill Knight asserted the defense that she was discharged because of her union activity, not because of sex discrimination. Respondent made a valiant effort to discredit the Commission's employee, but such efforts are hereby deemed unsuccessful due to the corroborating testimony of Kale, Bowlby, and Brooks, who all testified convincingly that Bill Knight did make the statement, as well as the unpersuasive character of the testimony attacking her credibility.

<sup>78</sup> Brooks noted that, since her termination in November, the employees had been given a 5-percent pay raise. Schmid did recall that Brooks commented that somebody at the National Labor Relations Board advised her to ask for all of her runs back.

<sup>79</sup> Respondent did not contradict this statement. There was an extensive attempt to discredit Brooks through the testimony of coworkers. However, these witnesses did not contradict her testimony and their endeavor is hereby found inadequate to warrant discrediting Brooks' testimony. However, even assuming that Brooks was discredited, it is found that there is sufficient independent evidence and admissions by Respondent to support the findings in this case.

<sup>80</sup> There is no contention that Clausen requested that the driver be discharged or otherwise disciplined. Clausen was passing on a complaint he received from a parent.

<sup>81</sup> This statement appears to be an exaggeration. Grady Knight admitted that there were always one or two school buses that were "egged," i.e., covered with eggs, or covered with shaving cream the last day of the school year. As almost all the bus drivers explained in their testimony,

Bobbie Knight asked Brooks to name the other drivers who permitted similar activity and Brooks refused. According to Brooks, Bobbie Knight then fired her.<sup>82</sup>

Brooks then stated that the squirt guns were not the real reason for her discharge, to which Bobbie Knight replied: "Well, that's just too bad, isn't it." Bobbie Knight then grabbed Brooks by the arm and led her to the door.<sup>83</sup>

When Bill Knight was asked how serious he considered Brooks' offense of letting the children play with water pistols, he stated that normally if there is a lack of control problem, such as letting students shoot water pistols, shaving cream, or throw eggs, then they try to work with the driver and, if the problem is reported, they may give the driver a warning. When asked why Brooks was fired for such an offense, he opined that the "principal had more to do with removing Sandy Brooks than the company itself did." There was no evidence that the principal requested that the driver of the bus be disciplined as previously indicated. Bill Knight considered Brooks a very good bus driver. This apparently lawful reason for the discharge must be closely examined to determine if it is pretextual, because of the prior unlawful discharges of the same employee cojoined with previously found union animus of Respondent and the apparent excessive nature of the discipline.

Bill Knight then modified his testimony and stated he would have fired Brooks even if not requested by Clausen because she approved of the students carrying squirt guns. When asked to reconcile this statement with his prior characterization of the offense as not being so serious as to warrant dismissal, he stated that it is a question of whether the employee is making an effort to correct the problem. The facts of the case demonstrate that Brooks was not previously warned about this type of infraction or offered an opportunity to correct the problem. Bill and Grady Knight admitted that they afforded employees who violated what they considered more important rules, such as leaving the bus unattended while children were aboard, a chance to correct the problem. The inherent inconsistencies in testimony not only warrant a finding that the testimony should not be credited,

ny, on the last day of school the children know that they will not be disciplined for rule infractions so some bring eggs and silly putty to spread around the bus. These exuberances are very difficult to clean up, so the drivers attempt to use different ploys to prevent the use of these materials. Brooks used the device of limiting the exuberances to water pistols and shaving cream, which are very easy to clean off the bus.

<sup>82</sup> It is noted that while Schmid was the designated manager and Respondent claimed Bobbie Knight was not a supervisor, Schmid was not afforded an opportunity to have input into the discussion to terminate Brooks. However, Schmid testified at the greatest length regarding Respondent's reasons for the discharge. This fact again brings into question the nature of the reason for the discharge which is found to be mere pretext. Also, Schmid's lack of input renders his statement that he had previously given Brooks a warning for her failure to inspect her bus unpersuasive in finding the claimed discharge for cause. This warning was not shown to have been considered in the decision, and Bobbie Knight's knowledge of the warning was not shown as one of the reasons for the discharge.

<sup>83</sup> Bobbie Knight had engaged in similar behavior with another employee and did not deny doing so; hence, Brooks' testimony is credited. Schmid, on the other hand, described the incident as not extremely heated, nor did he otherwise explain the need for physically leading Brooks to the door, which again impugns his credibility.

but also creates the inferences that the reasons are, in fact, pretexts.

Grady Knight's testimony supports this finding for he admitted that Respondent had complaints similar to that involved in Brooks' discharge in the past, yet there was no showing that the drivers involved in those past instances were discharged.

That Brooks was disciplined for an infraction that Respondent historically did not discipline with discharge and which Bill Knight initially indicated would not normally lead to discharge, but rather would lead to counseling and affording an opportunity to correct the problem, demonstrates variance from normal business practices which also supports an inference of unlawful motivation. *McGraw-Edison Company*, 172 NLRB 1604 (1968), enf'd. 419 F.2d 67 (1969).

Accordingly, it is concluded that Brooks was discharged for an unlawful motive, the desire to rid Respondent of a leader in the union organizing effort, in violation of Section 8(a)(1) and (3) of the Act.

The General Counsel also alleged in the complaint that the termination of Brooks on June 1, 1979, was violative of Section 8(a)(4) of the Act.<sup>84</sup> As the Supreme Court stated in *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967):

Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of Section 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges.

The record clearly demonstrates that Respondent had knowledge that Brooks filed charges with the Board prior to her discharge on June 1.

In light of the open and evident animus and hostility shown by the Knights toward Brooks, as well as the other employees who were active in the organizing campaign, Scumid's acknowledgement that Respondent knew of the filing of the charge by Brooks and the imposition of greater discipline for an infraction by an individual known to have filed a charge lead to the conclusion that Brooks could not have been disciplined except for her union activity and having filed a charge in violation of Section 8(a)(1), (3), and (4)<sup>85</sup> of the Act.

### 3. George Bernard Kale

Kale had been employed as a bus driver for K & E from March 1978 to November 1978. In addition to being discharged and then reinstated on November 2, Kale, like Brooks,<sup>86</sup> was discharged on November 20.

<sup>84</sup> No mention of this allegation is made in either brief.

<sup>85</sup> See *Andrew Craft, a sole proprietor d/b/a Vinyl Craft Fence Co.*, 241 NLRB 607 (1979).

<sup>86</sup> Noretta Kamholz, who will be discussed below, was also discharged on November 20.

He was handed a termination slip which stated as the reasons for the action: "Personality conflict and not working in the best interest of the company. The above has been evident since the opening of school 1978."

According to Kale, approximately 2 hours after receiving the termination notice, he telephoned Respondent and asked to speak to Bill Knight. Kale was told Bill Knight was not in by an individual whom he recognized as Mrs. Knight. He asked Bobbie Knight what the reasons on the discharge slip meant. Bobbie Knight, according to Kale, stated: "[T]hat as soon as I signed the blue Teamster membership form that I'd become a Teamster. I asked her then if I was entitled to the Teamster benefits, if that's all it took, and she said she didn't know about that and if anything—if it ever did come to an election time to vote Teamsters in or out that they would hire other drivers to sway the vote towards K & E . . . since this whole thing came about that I had been an instigator or an agitator of . . . trying to get other drivers involved with the Teamsters activity."<sup>87</sup>

Bill Knight testified that Kale was terminated "[b]ecause at every drivers' meeting he was always bringing up things, but he would never—he would never meet with any management to see what the problem was or how they could be worked out." Kale was on the grievance committee. Respondent failed to show that prior to November 20 it had cause to issue any written warnings relative to the announced reasons for Kale's discharge or, for that matter, for any other reason. Bill Knight's testimony admits that Kale was terminated because he would not discuss employee problems individually with management during the union organizing campaign. This admission not only supports the above findings of unlawful interrogation, but also that Kale was unlawfully discharged in violation of Section 8(a)(3) and (1) of the Act.<sup>88</sup>

### 4. Noretta Kamholz

Kamholz was also terminated on November 20.<sup>89</sup> Although initially denying that Kamholz was terminated on the same day as Kale,<sup>90</sup> after being shown her termination slip, Bill Knight admitted that she was terminated on November 20 for an incident that occurred on November 8. According to Bill Knight, the incident leading to her discharge is as follows:

She was over in another bus with another driver, and the kids were sitting there in the bus by themselves. And I went to the bus to see if she'd left the key in it, but the key was out of it. And then, when I saw her over in the other bus, I walked over and

<sup>87</sup> Based on the criteria hereinbefore stated, this declaration by Bobbie Knight is found to be violative of Sec. 8(a)(1) of the Act.

<sup>88</sup> The complaint alleges that on November 10 Respondent reduced the employment and earnings of Kale. The counsel for General Counsel did not ask Kale any questions regarding this allegation and has failed to otherwise support this complaint. Therefore, it is recommended that this allegation be dismissed.

<sup>89</sup> Counsel for the General Counsel did not call Kamholz as a witness due to illness, and in recognition thereof Respondent has not requested that an adverse inference be drawn. Accordingly, the merits of the allegation will be considered solely on the evidence of record.

<sup>90</sup> Brooks was also terminated on November 20.

told her that, "Noretta," I said, "I—you know better than this. I am surprised." And she came out and we started back across and then, all of a sudden, she started yelling, "You're harassing me." I said, "I have no intention of harassing you, except that you know better than to leave a bus with students on it." And I got the key and the principal came out of the high school and I was going to radio up to get another driver to come down and take the run, and the principal talked me into going ahead and let her finish. And she drove it the rest of the day and I made her check out and gave it to her with the termination slip of insubordination.

The statement, "You're harassing me," is what Bill Knight characterized as insubordination.<sup>91</sup>

As previously mentioned, Bill Knight admitted that the termination slip was dated 8 days after the incident occurred. The reason for the delay in taking disciplinary action was unexplained. It is also noted that, contrary to the contentions regarding the persuasiveness of the various school principals' wishes, in this instance it is admitted the school principal did not demand discipline but instead argued against it at the time of the incident, and no later comments by the principal are mentioned, yet the employee was disciplined.

The incident that led to her discharge occurred during standby time, the hiatus in time between the completion of one run and the commencement of another, which could be as long as 30 to 45 minutes. The testimony was somewhat contradictory regarding what employees were required to do during standby time. According to Oesau, Brooks, B. Northup, Roberts, Teegarden, and Kale, it was common for the drivers, during standby time, to congregate on one bus, particularly in winter, where they could all keep warm while keeping only one vehicle running. While Respondent argues that there was a company policy requiring the employees to utilize standby time to clean and inspect their buses, this company policy would not, of necessity, preclude employees from visiting one another during standby time after finishing these tasks. Respondent then argues that there is another company policy that prohibits employees from visiting one another during standby time.

It is concluded that, if there were such a policy, it was honored more in the breach than in compliance. As Grady Knight admitted, in confirmation of the employees' allegations, at least when he first started working for Respondent as a standby driver, he also congregated on a bus with the other drivers, until he was corrected by Manager Knecht. Grady also alleges that Knecht corrected other employees but no employees were disciplined for congregating on buses. Knecht testified that, particularly in wintertime, he would catch employees congregating on one bus and would then instruct those employees to return to their own vehicles. There was no showing that specifically Kamholz or the other above-listed employees were ever warned by Knecht or any of the Knights. Additionally, Knecht's testimony demonstrates that the employees merely received a remon-

strance for leaving their buses and were not formally disciplined.

Balascio recalled Bill Knight saying, during the previously described investigatory interview at the Anchorage Equal Rights Commission, that the employees had 30 minutes standby time which was to be used for cleanup. However, instead, the employees were meeting during that time to talk about the Union. Bill Knight indicated, according to Balascio, that the reason the employees were fired was for talking about union business.

The motive Balascio stated Bill Knight gave for his actions is hereby found to be the motive for Kamholz' dismissal based not only on Balascio's testimony, but also on the unexplained hiatus in time between the incident and the discharge of Kamholz, the fact that Kamholz was a known union supporter, that two other employees who were also known union supporters were discharged that day, and that the alleged infraction of the rules was not, prior to the date of her discharge, considered an extremely serious infraction which historically warranted the meting out of formal discipline. The fact that there allegedly were children on the bus at the time was not shown to so have changed the nature of the incident as to warrant immediate discipline, no less discharge, 3 days later. Furthermore, the alleged insubordination was not nearly as offensive as B. Northup's accusations of November 2,<sup>92</sup> which did not become grounds for discipline. Based on this analysis, it is concluded that the grounds given for Kamholz' discharge are only pretexts. It is hereby found that Respondent discharged Kamholz because of her union activity in violation of Section 8(a)(3) and (1) of the Act.

#### 5. Barbara Ellen Northup

On November 4, 2 days after her discharge and reinstatement on November 2, B. Northup<sup>93</sup> states that she received a telephone call from Bill Knight notifying her that she was terminated because of a company policy "not to hire married people." She told Bill Knight that they had always had married people working for them and he said no, now they were going by the book, and he has a policy about married people. She asked why her husband, who had only worked for the Company a total of 1 year, was retained rather than she, who had 4 years' tenure with K & E. Knight replied that she was a woman. Prior to this conversation, B. Northup had never heard of a policy prohibiting husbands and wives being simultaneously assigned permanent runs.

Northup's version of her discharge is credited. The witness was very direct and forthright. On the other hand, Bill Knight's testimony, as previously discussed, included contradictions, shifting explanations, and self-serving attempts to pass on a fact months later admitted as not clearly recalled as beyond his knowledge. Bill

<sup>91</sup> It is noted that Schmid also characterized Oesau's actions as "insubordination," but did not base her discharge on insubordination.

<sup>92</sup> As described above, she told Bill Knight several times that he was "disgusting."

<sup>93</sup> B. Northup was employed by K & E as a busdriver from September 1974 to November 1978. In 1975 she married Earle Northup, who also worked for K & E during the time period the alleged unfair labor practices occurred. Earle Northup and his wife contemporaneously worked for Respondent part of 1975, the first part of 1976, and the latter part of 1977.

Knight was evasive and at times argumentative. His inability to testify forthrightly and with candor and clarity as to highly material items leads me to conclude that these failures were calculated efforts to obfuscate the facts.

The stated basis for B. Northup's termination is found to be a pretext. Respondent, when asked about the present manager's wife being employed, did not claim that the policy was not applicable to managers, but rather stated that the wife works as an aide. The reason for the distinction between an aide and a driver was not explained. It was not claimed or shown that aides or managers were easier to replace than drivers. The claim that if one spouse gets upset and not only quits the Company but induces their partner to do the same has not been shown to be behavior peculiar to drivers. Furthermore, there was no evidence of a shortage of busdrivers as the genesis for the rule. To the contrary, the laying off, discharge, placing on standby, and outright termination of bus drivers by Respondent would be indicative of a plethora of drivers, not a fear of shortage. Consequently, the claimed basis for the rule, without further explanation, is inconsistent with Respondent's other statements and is indicative of an unlawful motive.

This conclusion is greatly buttressed by B. Northup's uncontroverted claim<sup>94</sup> that, pursuant to her request,<sup>95</sup> she was given a regularly scheduled run while both she and her husband were full-time employees. Respondent could have refuted their claim by producing payroll or other business records but failed to do so, warranting, as discussed above, an adverse inference. Accordingly, it is found that the basis for Northup's discharge was a pretext, and that the actual predicate for her termination and/or reduction to standby status was her protected concerted activity.

As was the case with the discriminatees discussed hereinbefore, Northup received an offer of reinstatement on April 9, 1979. As reflected in her May 7, 1979, letter to Bill Knight, Northup was not reinstated to her regular run, and she "thought she had made it very clear that if she was reinstated at her regular run, that, as in the past, she would be available for substitute runs only in the morning." The letter also states that this working relationship is consistent with past practice. B. Northup was only offered one or two substitute runs and one charter run at the time she wrote the letter. All other offers of work were made on 15 minutes' notice to work as substitute, which she considered inadequate notice for her to accept the run. Hence, she requested reinstatement to her former run. The letter also indicates her continuing availability for permanent assignment.

B. Northup's failure to accept the substitute runs on short notice, according to Schmid, was the reason he decided not to rehire her. Schmid could not recall if B. Northup's union activities were mentioned to him at that

time. The basis for refusing to rehire her is found to be a pretext. The record clearly demonstrates that, contrary to past practice, Respondent invoked or enforced a new rule<sup>96</sup> to discharge the Northup who was the more senior employee and who also happened to be the partner most active in the union organizing campaign. The discharge was called a change in status to standby, but there was no showing that after such action any offers of work on a standby basis<sup>97</sup> were made until April or May 1979. The offer of reinstatement is not considered a mitigating factor in this case since reinstatement was not to the same or comparable position held at the time of the first or second discharges or reduction in employment in November 1978. Accordingly, the employee's failure to accept less desirable and less frequent employment is considered, at the very least, a constructive discharge which became the grounds for discharge again, and is found to be a continuation of the previously found unlawful termination of employment in violation of Section 8(a)(3) and (1) of the Act.

#### 6. Shirley Roberts and Doris Miller<sup>98</sup>

Roberts worked for K & E from 1972 until 1978. Miller had worked for Respondent approximately 2-1/2 years prior to November 22.

On November 22, Bobbie Knight called both Miller and Roberts into her office and proceeded to give them a choice between taking a leave of absence or being fired. When they asked why, according to Miller's credited testimony,<sup>99</sup> Bobbie Knight stated that "we have to get to whoever started this and it's got to the point where we have to use innocent drivers so that party will come forward and say hey, we've had enough." Considering the facts of this case, Bobbie Knight's statement clearly demonstrates that Miller and Roberts were forced to take unrequested leaves of absence for unlawful reasons in violation of Section 8(a)(3) and (1) of the Act.

Also probative of the antiunion motive behind these actions is the additional testimony of Roberts which has been credited. Roberts stated that, during the November 28 meeting, Miller became very upset and stated she could not afford to take a leave of absence. When Roberts and Miller tried to ascertain why they were being denied employment, the conversation got around to talk-

<sup>96</sup> Even assuming *arguendo* that such a rule existed previously, the assignments of the Northups to permanent runs over several years demonstrate that it was honored only in the breach.

<sup>97</sup> The use of an euphemism for discharge further demonstrates the pretextual nature of Respondent's action. It is noted that at one time Oesau was also placed on standby and never called to substitute for other drivers.

<sup>98</sup> A review of the complaint, as amended, indicates that the General Counsel failed to include Doris Miller as an alleged discriminatee in Sec. 8 or any other portion thereof. This oversight, while not addressed by counsel for the General Counsel, does not preclude consideration of Miller's treatment herein. Miller and other witnesses testified, without objection, to the events considered herein. The events are sufficiently related to the subject matter of the complaint and were fully and fairly tried; hence, a decision on the merits is warranted. See *Free Flow Packing Corp. v. N.L.R.B.*, *supra*.

<sup>99</sup> Miller was an employee at the time she testified and her demeanor, as well as her clarity of recollection warrant crediting her testimony. Roberts, although sequestered, gave similar testimony and confirms the basis for the discharge.

<sup>94</sup> In fact, Bill Knight admitted B. Northup was assigned a regular morning run. Later in his testimony, Knight unpersuasively tried to change his testimony to indicate the permanent assignment was merely temporary until a substitute could be trained to take the route.

<sup>95</sup> B. Northup had other employment which only allowed her to take morning runs on a regular basis. This restriction on assignments was not claimed to be the basis for her discharge.

ing about the Union. Miller stated she signed a union card, and had just gone along with the crowd. After a long fruitless discussion, Roberts determined she could not find out anymore about the reason for the action so she signed the leave of absence slip. Because she had felt pressured into signing the slip, a few days later she went to K & E and told Bobbie Knight that she had not requested a leave-of-absence, had always performed her job, and had not had any problems with management and would like to be returned to her position or fired and given a reason for the action. Bobbie Knight refused Roberts' request and said, "No, I'm not going to do that. You weren't honest and open like Doris Miller was and admitted you signed a union card."<sup>100</sup> Until our problems<sup>101</sup> are solved, I'm—things are going to stay the way they are." Roberts then inquired what problems Bobbie Knight was referring to and was shown by Bobbie Knight "a load of newspapers" that discussed Respondent's labor problems. These comments by Bobbie Knight are further confirmation of Respondent's unlawful motive.

Finally, Bill Knight claimed, although not present during the forced leave-of-absence interview, that Shirley Roberts was "terminated" because she got more confused and Doris Miller got "caught up and carried away," she had trouble doing her work. The terms "confused" and "caught up and carried away" are found to be euphemisms for union activity.

These assertedly terrible employees were long-term employees, and one, Miller, was permitted to return to work within 2 weeks of the forced leave of absence. The other employee, Roberts, was offered reinstatement in April 1979, and continues to work for Respondent. These facts dispel any visions of ineptness Respondent tried to develop and again demonstrate the complete lack of credibility of the Knights' testimony. In sum, it is concluded that the placing of Miller and Roberts on forced leaves of absence was motivated by antiunion bias and violated Section 8(a)(3) and (1) of the Act.

#### 7. Darlene Teegarden

Teegarden, who is currently employed by Respondent, was initially hired at the beginning of the 1977 school year. As was the case with Roberts and Miller, Teegarden was terminated on November 22.

According to Teegarden,<sup>102</sup> after completing her morning run she received a call from Dixie Schultz, the Knights' secretary, and was informed that she would not be needed that afternoon. Teegarden asked why and was told she would have to discuss the matter with Bill Knight. She did go to K & E and Bill Knight said she was fired because "my statement [termination slip] said

incompatible with company policies."<sup>103</sup> When she inquired what that meant, Teegarden was told to go home and "search her soul." Teegarden said that would not do any good and Bill Knight told her to get a dictionary. At that juncture, Teegarden noticed the check was made out incorrectly and showed it to Bill Knight. At that time, Bobbie Knight entered the office and her husband "threw a book at her and threw my check at her and yelled for me to get out."

Teegarden followed Bobbie Knight into her office to get a corrected check and again inquired why she was being discharged. "She [Bobbie] said that there had been a statement in the paper saying that I wasn't for K & E policies, and I said I had also mentioned in the paper that I wasn't in the union so I wanted to know why. She [Bobbie] said that she was going to keep firing people until she got the right person that was in charge of the union." Bobbie Knight also mentioned that Teegarden walked off on November 2.

Teegarden's testimony was very similar to a version of her discharge published in a local newspaper<sup>104</sup> on November 29.

The reporter who wrote the article, Barbara Wold, testified that the quotes in the article regarding Mrs. Knight's statements are direct quotes taken during a telephone interview. Wold takes shorthand. The quotes state: "Bill has stated that this mess will be stopped . . . whoever is doing the leading . . . needs to come forward and say I've had enough—stop . . . [Teegarden was fired because] she made a statement that the union is not the answer and that K & E policies are not for her." The proximity in time between the article and the discharges, the similarity of reasons between the witnesses' testimony and the article, and Wold's demeanor lead me to credit Wold's testimony that the article clearly reflects Respondent's reasons for the discharge of those individuals named therein. Also, Bill Knight admitted Teegarden was let go<sup>105</sup> because she went to the newspapers rather than to management. He also admitted Tannehill was let go for the same reasons, they had "problems"; i.e., the union organizing campaign.<sup>106</sup>

Based on the credited testimony, the admissions of Bill Knight, and the timing of the discharge, it is concluded that Teegarden's termination was unlawfully motivated in violation of Section 8(a)(3) and (1) of the Act.

#### 8. Margaret Tannehill

Tannehill<sup>107</sup> was also placed on an admittedly unrequested and unwanted leave of absence on November 22. Bill Knight called her into his office on that day and proceeded to tell her that he was going to find out who

<sup>100</sup> Miller claims Bobbie Knight asked her if she signed a union card. This slight disparity in the versions of Miller and Roberts is found insufficient to adversely affect Miller's credibility. Also, the threat of harassment for signing a union card is found to be an independent violation of Sec. 8(a)(1) of the Act.

<sup>101</sup> As found hereinabove, "problem" is one of the euphemisms for the union organizing campaign.

<sup>102</sup> Her testimony is credited based on her status as an employee, demeanor, inherent probability, similarity of action to other employees, clarity of recollection, and candor.

<sup>103</sup> The similarity between this statement and the alleged basis for Kale's discharge is noted.

<sup>104</sup> See G.C. Exh. 9, which also discusses Roberts' and Miller's forced leaves of absence.

<sup>105</sup> His claim that she was given a leave of absence again demonstrates his lack of recollection and candor, and reflects his propensity to use leaves of absence in lieu of discharges when the intent is to discharge.

<sup>106</sup> Teegarden also was rehired in April 1979.

<sup>107</sup> This individual commenced her employment with Respondent in October 1974 and worked for K & E continuously except for the disruption during the 1978-79 school year.

was behind the labor problems he was having. He then showed her a newspaper article about the November 2 discharges. The article contained a picture of the employees that attended the meeting at the restaurant the morning of November 2 and clearly showed Tannehill seated next to Conner, the union representative.

Bill Knight told her that he would fight the Union all the way, he would just not allow it, that he was going to get to the bottom of it and find out who was behind it, and asked Tannehill if she knew who was "behind it." She replied she did not know and explained to him that she could not afford to take a leave of absence for that would not make her eligible for unemployment; since she was the sole support of her two children, she needed to hold a job. Bill Knight replied that she could always go on welfare.

A few days later, Tannehill returned to K & E in hopes of finding that Bill Knight had a change of heart and asked if she could have her regular run. Bill Knight said no, that he had decided she was on a leave of absence whether she signed the slip or not. He again stated that this was his way of trying to find out who was involved, and that there would be several persons given leaves of absence. Bill Knight also stated that she should not have attended union meetings.<sup>108</sup> The two of them continued discussing the union "problem" when Mrs. Knight entered and became upset over the content of the conversation, disclaimed any connection between her forced leave of absence and the organizing campaign, and, when Tannehill insisted, Bill Knight admitted the connection. In the now familiar pattern, Bobbie Knight became very irate, ordered her off the property immediately and as with Brooks, took her by the arm, escorting her out the door.

On January 4, 1979, in response to the statement on her leave of absence slip which provided that the Company would meet with her on January 5, 1979, Tannehill telephoned Respondent to arrange an appointment for the following day. Bill Knight answered the telephone and informed her that she had "terminated herself" because she had not signed the leave-of-absence slip by January 1. Tannehill was finally reinstated on May 4, 1979.

As indicated above, Tannehill's testimony is credited. Additionally, Bill Knight admitted he forced Tannehill to take a leave of absence because of "unrest," dissatisfaction, and for the same reasons he let Teegarden go. Accordingly, it is concluded that Tannehill's forced leave of absence was also unlawfully motivated in violation of Section 8(a)(3) and (1) of the Act.

#### 9. Elaine Bowlby

Elaine Bowlby,<sup>109</sup> at the close of the 1977-78 school year, told Respondent that she was quitting. Bowlby claims that she makes the same statement every year because she is tired at the end of the school year, that Re-

spondent knows that she was not serious. The Company claims that they believed she was quitting, for she was tired of working, tired of having her husband take her earnings for his own purposes, and that she was going to move to another State.

To counter this claim, Bowlby asserts that in the middle of August 1978 she and a friend, Jane Boles,<sup>110</sup> had lunch with Grady Knight, that during the lunch Grady Knight asked her to reconsider the decision to quit, explaining the profit-sharing plan and indicating how much coverage she would get, saying she would be credited for 6 years' employment. Therefore, Bowlby claims that she told Respondent that she would take a 6-month leave of absence rather than quit if she did not lose her seniority. According to Bowlby, Grady told her to stop by the Company's offices before she left Alaska for a vacation and family gathering to pick out her routes. A couple of days before she left Alaska, she did stop by Grady's office, discussed several possible routes with him, and was told by him that when she returned she could have any run she wanted.

She returned to Alaska on September 24 and, during the first part of October planted her garden, then went to K & E after renewing her license and taking the required physical examination to resume her employment. Grady Knight told her that she had quit, that his father had implemented new rules that eliminated leaves of absence and seniority. Grady Knight also informed her that, if she wanted to work for K & E, she would have to file an application<sup>111</sup> and begin like a new driver on standby or with just one run. This change in assignment would have greatly decreased her income, which had been \$51 a day.

Bowlby did attend the November 2 meeting and did discuss her position at that time with Bill Knight. While Bill Knight claimed during the meeting that the way he remembered the matter, Bowlby had quit and had a for sale sign on her house,<sup>112</sup> Bowlby did inform him that she had changed her mind at Respondent's urging and decided to take a 6-month leave of absence, that Grady knew about it and that, since Grady was the manager, she thought that it was unnecessary to speak to Bill Knight at the end of her leave of absence.

Bowlby's version is credited, not only because Bill and Grady Knight have not been found to be credible witnesses, but also because Bill Knight's first statement to Bowlby at the commencement of the meeting confirms her version. He said:

I see Ms. Bowlby is here. I'm glad to see she's here. She has never made an effort to see me, and I sit in here and begged and pleaded with you and Jane not to quit, to take a leave of absence. Let me give you

<sup>108</sup> These statements are also found to be independent violations of Sec. 8(a)(1) under the criteria announced above.

<sup>109</sup> Bowlby was a long-term employee. She commenced employment with K & E in the fall of 1972. It was acknowledged that she was one of Respondent's most skillful busdrivers, and has won busdriving competitions.

<sup>110</sup> Boles used to work for Respondent as a busdriver but left Alaska prior to the hearing and was unavailable to testify. Accordingly, no inferences will be drawn from the failure to call this individual as a witness.

<sup>111</sup> Dixie Armstrong, who does not know Bowlby personally, stated that she heard Bowlby state in the middle of September 1978 that K & E would not give her her job back and heard Grady Knight say that she could come back on standby. This witness' testimony is credited based on her demeanor, lack of involvement, and status as a current employee.

<sup>112</sup> See Appendix A. [Omitted from publication.]

a letter, *plus the six months is not up*, and anytime that you want to come back, you know that you can get to see me because I've made everybody, I've tried to get them—I don't have horns. I talk to the people. If they'll ask me and let me make it available so that I can always make myself available. [Emphasis supplied.]

Bill Knight mentioned the 6-month time period without Bowlby or anyone else discernibly raising the issue. Additionally, Knight admitted that he gave Bowlby the figures concerning the profit-sharing plan prior to the meeting, which further supports Bowlby's version of the events concerning her cessation of employment.

Another fact supporting Bowlby's version is the unrefuted proof that she took two charter runs during the summer of 1978. Respondent failed to explain why an employee that unquestionably quit would be assigned two charter runs. Furthermore, Brooks' credited testimony demonstrates that Grady Knight told her in October or early November 1978 that he knew Bowlby started the organizing campaign and she was on a leave of absence.

The Knights admit that they attempted to dissuade Bowlby from quitting and I find, based on the credited evidence, that they were successful.<sup>113</sup> The testimony of Shirley Roberts is persuasive that Respondent had, as a regular practice, permitted leaves of absence in the past. Therefore, the treatment of Bowlby was a deviation from past practice.

Bowlby testified that Bill Knight stated he would not take her back because of her involvement in both the past and current union organizing campaigns. Balascio overheard Bill Knight tell Bowlby, at the Anchorage Equal Rights Commission factfinding meeting, that he would not take her back because of her involvement with the Teamsters 4 years prior to the current organizing campaign. This credited testimony leads me to conclude that Respondent failed to reinstate Bowlby after her leave of absence because of her involvement in the current as well as past union organizing campaigns in violation of Section 8(a)(3) and (1) of the Act.<sup>114</sup>

In sum, it is noted that those employees found to have been discriminatorily terminated in violation of Section 8(a)(3) and (1) of the Act were the same employees that attended the initial organizing meeting at Oesau's house and whose pictures appeared in the newspaper account of the November 2 incident. The timing of the disciplinary actions against these employees further supports the preceding findings of unlawful motivation. Also considered is the paucity of disciplinary actions against these

same employees prior to the commencement of the union organizing campaign. Only after the protected concerted activity began and became known were there faults found with the discriminatees. An overview of the individual actions requires the conclusion that the terminations or reductions of employment described were motivated by and in direct response to the union organizing campaign in violation of Section 8(a)(3) and (1) of the Act.

#### Other Matters

Although not specifically addressed in the General Counsel's brief, the complaint, as amended, also alleges additional instances of interrogations and surveillance. One matter covered at hearing was a union organizing meeting at the La Casa Restaurant in November 1978. The testimony regarding this meeting was very confused and it appeared that Bobbie and Grady Knight, together with two employees, appeared at the restaurant to have dinner on the same day as the scheduled meeting. Inasmuch as there was no showing that Respondent knew of the meeting or that Eagle River had more than one or two restaurants to disprove the claim of mere coincidence, it is concluded that counsel for the General Counsel failed to adequately support this allegation. It is recommended that this allegation be dismissed.

Additionally, any other matters that may have been encompassed in that catchall allegation that have not been specifically discussed herein are hereby found to have not been supported by sufficient evidence to warrant a finding and, therefore, should be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with economic and other reprisals if they supported the Union; by interrogating its employees about their union activities or those of other employees; by soliciting grievances from its employees with the implied or expressed promise that they would be remedied without a union; by promising, announcing, and granting benefits and improvements in terms and conditions of employment to employees in order to discourage them from supporting a union; by threatening employees with harassment or loss of employment for supporting the Union; by telling employees that they would not be considered for employment because they supported the Union; by telling employees that the names of card signers or union supporters would become known to it, and such employees would be discharged; by threatening employees with discharge if they talked to known union supporters and/or discussed the organizing campaign on company property, Respondent has violated Section 8(a)(1) of the Act.

4. By telling employees that they should organize their own grievance committee, by requiring the election of such a committee in lieu of the Union, by offering to pay for a lawyer to assist in the formation of such a commit-

<sup>113</sup> The testimony of Mary Hall in ostensible support of Respondent pertained only to the end of the 1977-78 school year and is not indicative of any change of position induced by the Knights during the summer. Furthermore, Hall clearly inferred that she did not like Bowlby, which suggests that her testimony was not unbiased. Lee Staudinger also testified that Bowlby said she was quitting at the end of the school year, but the testimony does not address any subsequent event. However, Staudinger inferred that the drivers often make comments similar to Bowlby's at the end of the school year.

<sup>114</sup> There is some evidence that Bowlby's son was not considered for employment by Respondent because the Company felt that he would also favor the Union, but this matter was not fully and fairly tried and will not be considered on its merits.

tee, and by meeting with and negotiating with the committee, Respondent has dominated and interfered with the formation and administration of a labor organization in violation of Section 8(a)(2) and (1) of the Act.

5. By discharging, placing on standby, suspending, terminating, laying off, placing on standby status, and/or effectively reducing the employment and earnings of Dolores Oesau, Sandra Brooks, George Kale, Frank Sargent, Barbara Ellen Northup, Margaret Tannehill, Noretta Kamholz, Shirley Roberts, Darlene Teegarden, and Doris Miller, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By refusing to hire or to consider for rehire or reinstatement Elaine Bowlby, Sargent, Oesau, Brooks, and Northup because of their union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By refusing to hire or consider for hire or rehire employee Sandra Brooks because charges were filed on her behalf with the National Labor Relations Board, Respondent has violated Section 8(a)(4) and (1) of the Act.

8. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

#### THE REMEDY

I shall recommend that Respondent be ordered to cease and desist from engaging in the conduct found unlawful herein and to post an appropriate notice. The notice should be posted for 1 year in view of the severity of the unfair labor practices, the time span within which they occurred and the delay between violation and implementation of remedy. I shall also recommend that Respondent be ordered to offer reinstatement to employees found to have been unlawfully discharged. Respondent will also be ordered to make whole those employees who have suffered loss of pay due to discrimination against them, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>115</sup> Respondent should also be ordered to stop bargaining with and disestablish the employee grievance committee.

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>116</sup>

The Respondent, K & E Bus Lines, Inc., Eagle River, Alaska, its officers, agents, successors, and assigns, shall:

<sup>115</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I do not order the reinstatement of employees Kale, Tannehill, Teegarden, Roberts, Kamholz, and Miller for the record demonstrates, and it has been found, that they were fully reinstated to the same or better jobs. However, these employees were not made whole for the loss of earnings and benefits suffered as a result of their discriminatory loss of employment.

<sup>116</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

#### 1. Cease and desist from:

(a) Discouraging union activity on behalf of the Union or any other labor organization by discharging, laying off, refusing to hire, rehire, or reinstate, suspending, placing on standby, placing on unrequested leave of absence, harassing, disciplining, or otherwise discriminating against employees in any manner with respect to their tenure of employment or any term or condition of their employment.

(b) Coercively interrogating its employees about their union activities or those of other employees, and accusing employees of being union instigators.

(c) Soliciting grievances from its employees with the implied or expressed promise that there will be remedies without a union.

(d) Expressly or impliedly promising or granting benefits or improvements in terms and conditions of employment or announcing such benefits or improvements to employees in order to discourage them from supporting the Union or any other labor organization. However, nothing herein shall be construed as authorizing or requiring Respondent to vary or abandon any benefits previously conferred.

(e) Threatening employees with economic and other reprisals because they engage in union activities, or talk to known union supporters.

(f) Telling employees that Respondent is against the Union, and that it will learn the identity of union card signers and the names of employees who support the Union and suggesting and encouraging employees to withdraw their union support and announce such withdrawal by signing a petition.

(g) Soliciting employees to name union supporters or otherwise engaging in surveillance of union activities or creating the impression among employees of surveillance of union activities.

(h) Telling employees that they will not be considered for employment or reemployment unless they forsake the Union or refusing to hire employees because charges were filed on their behalf with the National Labor Relations Board.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

#### 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withhold all recognition from, repudiate, and completely disestablish the employees' grievance committee and successors thereto.

(b) Offer Dolores Oesau, Sandra Brooks, Elaine Bowlby, Ellen Northup, and Frank Sargent immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any replacements, without prejudice to their seniority or other rights and privileges, and to make them and employees George Kale, Margaret Tannehill, Darlene Teegarden, Shirley Roberts, Noretta Kamholz, and Doris Miller whole for any loss of earnings or benefits connected with their employment status they may have suffered because of Respondent's discrim-

ination against them in the manner set forth in the Remedy section herein.

(c) Expunge and remove from its records and files any warning notices, suspensions, or other notations dealing with the terminations, layoffs, forced leaves of absence, and/or other discriminatory actions against employees found herein. Respondent shall write a letter to each affected employee informing him or her that it has complied with this provision.

(d) Preserve and, upon request, make available to the Board or its agents all payroll and other records necessary to compute the backpay rights set forth above in the section entitled "The Remedy."

(e) Post, in conspicuous places, at its Eagle River facilities, including all places where notices to employees are customarily posted, for 1 year, copies of the attached notice marked "Appendix B."<sup>117</sup> Copies of said notice,

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<sup>117</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

on forms provided by the Regional Director for Region 19, after being duly signed on behalf of the board of directors and by the highest managerial official of the plant in which the notice is posted, shall be posted by K & E Bus Lines, Inc., immediately upon receipt thereof, and shall be maintained by it for 1 year thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director for Region 19, in writing, within 20 days of the receipt of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the complaint found to be without merit are hereby dismissed.

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Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."